ORIE L. PHILLIPS ★ *Senior Circuit Judge - Tenth Circuit*

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The Work Ahead

Carl B. Rix, the Incoming President of the Association, has written for its members an earnest statement of the Association's practical accomplishments of the past decade, with a specific outline of the major tasks which he sees ahead for the organized lawyers of America, under the Association's leadership.

James C. Carter

The second in our series of sketches of great lawyers at the turn of the century is written by Frederic R. Coudert, himself one of the beloved leaders of our Bar. So far as we know, no other living lawyer had as close personal and professional association with Mr. Carter. The delineation of that truly great American lawyer should bring inspiration and high resolve to all who read it.

Liberty and Order: Conflict and Reconciliation

Ben W. Palmer has written brilliantly another article which, while essentially non-controversial, is another contribution toward giving to the lawyers of America a wider and more sound perspective for their great tasks. It seems to us to be a worthy appeal to the pride of the profession and for a consciousness of its essential unity. Incidentally, Mr. Palmer emerges now as a poet; he confesses the authorship of the opening sonnet; hence "no quotes".

Reorganization of the Congress; Handling of Tort Claims, etc.

One of the most useful articles we have been privileged to publish is that by Former Congressman Aaron L. Ford on the Legislation Reorganization Act of 1946. He is in special position to speak with authority. His explanation of the new provisions as to the settlement or trial of tort claims against the Government should be read carefully, as also what he writes as to the registration, etc., of "lobbyists".

The Courts of the United States

The report of Director Henry P. Chandler of the Administrative Office, to the 1946 Judicial Conference of the Senior Circuit Judges, is replete with significant facts as to the trends in the judicial business of the Courts and as to the efficient handling of it. After all, the lawyers and people should not lose sight of the outstanding fact of the improving and generally acceptable administration of justice, in and by the federal judicial system as a whole.

Exceptions to the Administrative Procedure Act

Ashley T. Sellers, authority on the new statute, contributes his second and concluding article, which will be most helpful to all lawyers who have to cope with questions of practice and procedure affected by the rather intricate provisions as to "exceptions" to the Act and to its Sections.

October Term of the Supreme Court

The Nation's highest Court opened its term under circumstances which made it the cynosure of all eyes, among the profession and the public. Our reporter chronicles incidents and impressions.

Labor Disputes and Judicial Process

Eugene C. Gerhart's winning discussion in the 1946 Ross Essay Competition is readable and significant, as reflecting a young lawyer's approach to one of the most difficult problems of domestic policy.

Message from Canada

The President of the Canadian Bar Association, Chief Justice J. C. McRuer of Toronto, wrote for this issue of the JOURNAL the earnest message of greeting to American lawyers which he brought to our Atlantic City meeting, where the plans for further practical cooperation in common causes were implemented. Our editorial comment entitled "From the Bar of Canada", is pointed.

The World Court and the Connally Amendment

Senator Wayne Morse has written especially for us a stirring account of the climax of the fight in the Senate for American acceptance of the jurisdiction of the Court. He gives his views of the controversial Connally amendment as to disputes involving matters of "domestic jurisdiction." His tribute to the work of the Association is significant.

Judicial Robes, "Natural Law", etc.

Frank W. Grinnell, scholarly State delegate from Massachusetts, submits pungent comments on four recent articles in our columns. Replying to Judge Frank, he points out that members of the Massachusetts Supreme Court did not resume the wearing of the customary robes until our "completely adult jurist" became its Chief Justice. He quotes spirited exchanges as to the sources of law, in the Holmes-Pollock letters, to show that in one instance the gifted British scholar seems to have silenced his agile correspondent.

Incoming President Rix Charts the Tasks Ahead

It is a great privilege and honor to be called to the leadership of this Association, at this critical time in the affairs of our country and the world. I thank you for the compliment of your selection, but I confess that it brings to me a very solemn sense of responsibility.

At least eleven times during the past ten years this Association has demonstrated its capacity to lead and act:

1. First we re-formed our own organization so as to place it on a representative basis and enable it to speak for and reflect the views of a great majority of the lawyers of the United States. Without that we could not have done what we have since done.
2. Next we supported the rule-making power of the Supreme Court and the proposed Rules of Civil Procedure, after conducting forums and institutes through which our members made many suggestions to improve the draft Rules and make them acceptable. Now we are doing the same thing as to the proposed amendments of the Rules.
3. We worked constantly for improvements in the administration of justice, and we successfully urged the creation of the Administrative Office of the United States Courts.
4. We opposed and fought the bill to augment the Supreme Court, and we helped to organize the country and arouse the public opinion which defeated that measure.
5. We strongly urged that Rules of Criminal Procedure be drafted, submitted to the Bar for criticisms and suggestions, and put into effect. That has been done.
6. We led the long fight to curb the abuses in the administrative agencies and to prescribe fair standards of agency procedures, to the end that this may be "a government of laws and not of men." The war delayed this great step forward, but the Association's Administrative Procedure Act is now a part of the law of the land, through the unanimous action of both houses of the Congress and the signature of The President.
7. We pledged our resources and our man-power to the support and furtherance of the Nation's war effort, and did all we could. Our Legal Assistance work for the Army and Navy was a great help to the men and women in uniform.
8. Lately our Association has been called on to advise and assist as to military justice and to suggest improvements in the Army courts-martial system. This work is still in progress, in charge of a Committee nominated by the President of our Association and appointed by the Secretary of War.
9. We agitated continually for substantial increases in the insufficient salaries of Federal and State judges, as a measure of justice to them and as a means of giving them a feeling of security, independence, and fair compensation, in the performance of their duties. An increase of $5,000 in the annual salaries of all Federal judges was enacted this year; many of the States have increased the salaries of their judges.
10. We joined hands with our brethren of the Canadian Bar in behalf of the continuance of the World Court, the improvement of its Statute, and the recognition of them as an integral part of The United Nations and its Charter. This was accomplished in San Francisco.
11. Then we went to work and led the fight to have the United States bind itself to accept the compulsory jurisdiction of the World Court over legal disputes with other Nations which have accepted the Court's jurisdiction. This was accomplished by a decisive vote in the Senate.

The possession of such a power and capacity for effective action when our cause commends itself to the good judgment of legislatures and the people carries with it a corresponding responsibility, especially in times like these.

There are many things immediately ahead for us to do:

Organizations such as ours should take the lead and contribute all they can to the progressive development and strengthening of international law and its statement or codification.

The Charter of The United Nations will need to be strengthened

Note: Upon being elected President of the Association for 1946-47, at the Atlantic City Annual Meeting, Carl B. Rix, of Wisconsin, gave to the JOURNAL this statement to the members of the Association as to the Association's accomplishment and the work which he sees as immediately ahead of the Association and its members.

and improved, in respects which this Association has pointed out, and perhaps in some others, when an atmosphere of international cooperation has been regained; but meanwhile we should do all in our power to keep America united, undivided, in support of The United Nations and the World Court.

Further improvements and implementations in the control of the administrative agencies will be needed, and these will be tasks for our experience and skills. Administrative agencies in some States may be such as to call for legislation.

The laws and regulations governing aviation, air traffic, and airports, are new fields for the work of disinterested lawyers.

Public respect and confidence in all our Courts must be kept on a high plane, as basic in our federal system; and all our Courts should cooperate by being worthy of that respect and confidence.

The projected survey of the profession of law will undoubtedly disclose some conditions for which constructive remedies will have to be found, in the interests of the profession and the public.

Above all, we as lawyers, and our Bar Associations, have three great fundamental objectives:

(1) To work unceasingly to improve the administration of justice and the rule of law, in the Courts and the administrative agencies;

(2) To strive to improve our profession, its standards of education and fitness, its integrity and fidelity to the Canons of Ethics, its capacity to serve the public honorably and well;

(3) To defend and preserve against all assaults and betrayals the American system of constitutional government, the rights and freedoms vouchsafed by our Constitution, the dignity and the opportunities of the individual citizen, the supremacy of law and justice over arbitrary power in the hands of governments, groups, or organizations.

There is work for all of us to do, in this Association, in our State and local Associations, in our home communities. No lawyer can say that there are not things for him to do, in these great causes. This Association has been effective because it has become a great *team*, inspired by a common purpose.

Everywhere I go, I find that our younger lawyers, especially those who have come back from the war, are eager to get down to work in a practical way to help their country solve the problems which make all of us anxious. They are uncertain as to what they can do and how they can best do it. They look to us for direction, guidance, advice. We ought to help our younger lawyers get into action for a better America. I do not care what views they hold or what political party they belong to, so long as they work for American ideals and traditions of law and impartial justice, within the framework of our form of government. This is a new field of civic activity for us; we shall have to open new paths. We cannot let down these eager, earnest young Americans.

For a year I am to be your President and then go back to working in the ranks. I shall need the help of all members of the Association. I shall try not to fail you. If we rededicate ourselves to our high purposes, and then go to work for them, we shall repeat our record of accomplishments.

Carl Barnett Rix

In electing Carl B. Rix as its President for the Association year which starts November 1, the Association has chosen a lawyer who has had a great deal of experience in the practice of law, in the teaching of law, in business, in religious work, in the work of the Association and the advancement of the interests of the profession and the organized Bar, and in leadership in civic and political affairs, and has without exception fulfilled the tasks he has undertaken.

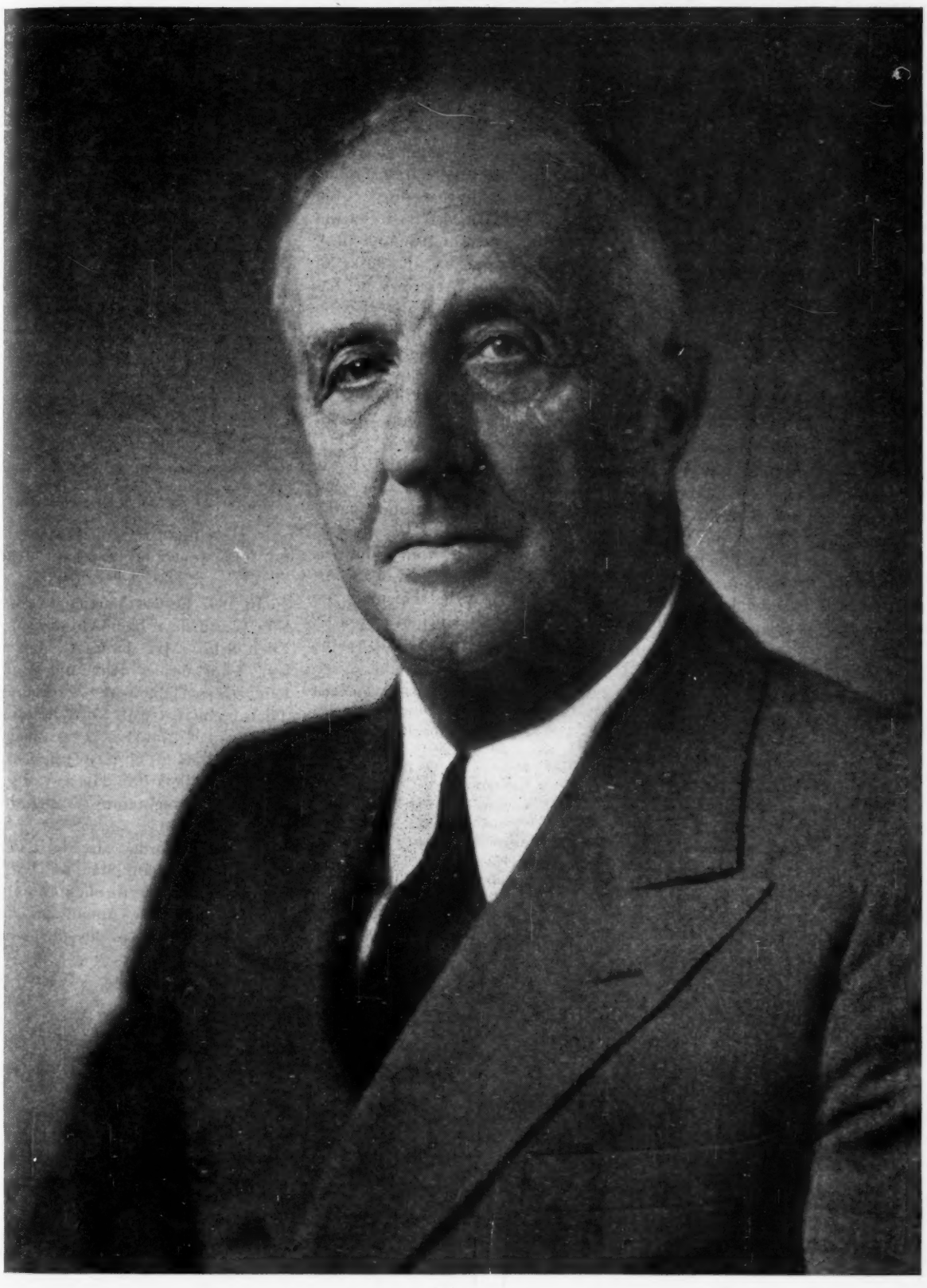
President Rix was born at Jackson, Wisconsin, September 30, 1878, the son of Wareham P. and Marie (Stauffer) Rix. He received his law degrees at Georgetown University in 1903 and 1904. He was admitted to the Bar of Wisconsin in 1905, and has practised law ever since in Milwaukee and his native State. As the head of the law firm of Rix, Kuelthau, and Kuelthau, he has had the usual run of general practice, with trials, appeals, etc.

He has engaged also in the development and direction of many business enterprises, in a variety of fields, and has served as a director and officer of those corporations. This has given him a broad and humanizing business experience, in addition to his training in the law.

He has found time to be also a member of the faculty of the Marquette University Law School since 1904. The subjects which he has taught are Property and Future Interests.

In the Association and through his related activities, he has devoted especial attention to post-admission legal education, and has cooperated with the law schools in pioneering work in that field. During 1935-36, he took an active part in bringing about the reorganization of the Association on its present representative basis. He worked untiringly in the organization of the Association's fight against the 1937 bill to "pack" the Supreme Court of the United States. Through the Association and the American Judicature Society, of which he is a Director and Vice President, he has worked long for the improvement of the administration of justice.

He has been actively interested in the objectives of international organization, The United Nations, the World Court, and the progressive



growth and strengthening of international law. He is a member of the Association's Special Committee in that field and a staunch supporter of The United Nations as well as all projects for a closer cooperation among the Nations, particularly with the lawyers of Latin America and the Inter-American Academy of International and Comparative Law, organized under the auspices of the Bar of Cuba and the authority of the Cuban Government, with George Finch, of the Carnegie Endowment as Chairman. During the past few years, he has taken a deep interest and participation in international trade, particularly with Latin America, with research trips to Mexico, Guatemala, and Columbia.

Mr. Rix has long been a leader in the Wisconsin State Bar Association and in the efforts to establish an integrated Bar in Wisconsin—a form of Bar organization in which he earnestly believes. He was the President of the State Association in 1933-34, after he was President of the Milwaukee Bar Association in 1932-33.

One of his chief interests has been in the religious work of the Episcopal Church, and for years he was in service as a vestryman of St. Paul's Church and in the Diocese of Milwaukee in many capacities. In recent years, he has relinquished much of that work, but is still the Chairman of the Finance Committee of the Diocese, President of St. John's Home of the Diocese; also a director of the Lake School for Girls and of the Milwaukee University School, which his children attended.

Because of his strong belief in the duties and responsibilities of citizenship, he has been active in civic and political affairs in his city and State, although never as a seeker after public office. He was an alternate delegate to the Republican National Convention in 1940. At the Chicago Convention in 1944 he attended as a proxy member of the National Committee, and held that proxy from 1941 to 1944. He declined election to the Committee in 1936 and 1944, preferring to eschew the tasks of party mechanics. At times he has taken part in primary and election contests in his politically-minded State. Although a "regular" in his party allegiance, he has been identified generally with the "liberal" and forward looking elements in his party organization.

His many-sided activities in the American Bar Association are deemed especially to fit and qualify him to be its President. His interests and his work have been almost as diversified as the program of the Association, as may be shown by the following list of principal capacities in which he has served during the past ten years:

1937-1938	Chairman of the Ways and Means Committee
1937-1945	Member of the House of Delegates as State Delegate
1938-1941	Member of the Board of Governors
1940-1941	Chairman of the Budget Committee
1941-1945	Assembly Delegate to the House of Delegates
1942-1946	Member of the Advisory Committee of Section of International and Comparative Law
1942-1944	Chairman of the Committee on Advanced Legal Education of Section of Legal Education
1942-1944	Chairman of the Special Committee on Post-war Work Correlation
1943-1946	Member of the Council of the Section of Legal Education
1944-1946	Vice-president and Director of the American Bar Association Endowment
1944-1945	Member of the Special Committee on the Economic Condition of the Bar
1944-1945	Member of the Advisory Committee on the Economic Condition of the Bar
1944-1946	Member of the Section's Committee on Cooperation with the Inter-American Bar Association
1944-1946	Chairman of the Committee on Advanced Legal Education of the Section of Legal Education
1944-1946	Member of the Committee on the Pre-legal Program of the Section of Legal Education and Admissions to the Bar
1945-1946	Member of the Special Committee to Report as to Proposals for the Organization of the Nations for Peace and Law
1937-1938 1945-1949	Member of the Council of the Section of Bar Activities.

In 1907 he was married to Miss Sara C. Burney. Their children are Ellen Sybil (Mrs. James C. Townley), John Barney Rix, and Mary Paul (Mrs. James M. Markham). Their home is at 3019 North Summit Avenue in Milwaukee. He is a member of Delta Chi, Order of the Coif, and Delta Theta Phi. His diversions have been riding, tennis, fishing and golf.

President Rix has already visited and addressed many State and local Bar Associations throughout the United States. He intends to devote himself fully to his duties as President.

Some Reminiscences of James C. Carter

by Frederic R. Coudert

OF THE NEW YORK BAR

Even among the seniors of our present day Bar, few have memories of personal or professional contact with James C. Carter, eminent Barrister of the Common Law, who believed that the Congress and the Courts should keep their man-made law four-square with what is deep in the hearts and souls of men. We are privileged and honored to publish a distinguished lawyer's recollections of his early association with such an exemplar of our profession. With Mr. Coudert's vivid narrative, we publish from old archives, at his suggestion, some excerpts from Joseph H. Choate's classic tribute to his antagonist and friend.

By reason of a well-known psychological law, our early impressions seem to be stronger and more indelible than our experiences in later life. Perhaps that is why Mr. Carter's personality made such an impression upon me in my early youth, during college days and my apprenticeship at the Bar. He was an old friend of my father, and it was therefore my privilege to see him and to hear him from time to time.

He was a lawyer of the old school, a barrister and a philosopher. He believed in the law as the outcome of human reason, was a great orator in the Greek sense of the word, a master of language but with the knowledge that it must be the resultant of human reason and be directed to the solution of human problems.

It is the fate of the lawyer to leave little impression upon history unless he chances to have occupied a prominent position in the world of politics or government. The impression that Mr. Carter made upon the law is recorded in the decisions of the judges. These decisions alone are the materials upon which permanent historical reputations in the law are built, and the counsel who furnish so much of the labor and learning soon pass into the limbo of oblivion.

Carter's Philosophy of The Law

The tradition of all great lawyers is a brief one; and the name of James C. Carter, which bulked so large for half a century at the New York Bar, is probably known to few save the older lawyers and judges with whom he came into contact. He possessed not only a most impressive personality, as was evidenced by those who heard him almost daily in the law courts, and who nicknamed him "boanerges", the son of thunder; but he had a philosophy of the law from which he never deviated throughout his long career.

His thesis ever maintained was that Austin and the orthodox school of the day were all wrong in believing that law was a command. He insisted that statute law was only effective when declaratory of the existing law or custom itself, but that if it was contrary to the customs and usages of a people it was merely detrimental and would be beaten by subterfuge and ultimate practical annulment. It was for that reason that in his many contests with James Dudley Field over the Field Code, he finally triumphed in having that Code rejected by lawyers and legislators alike.

A Crystallization of Customs and Morals

Mr. Carter believed that the law developed only through judicial decision and the experiences of a growing civilization as evidenced by the decisions of the courts. To him law was the crystallization of customs and of morals. It was the result of a constant series of experiences, and these embodied human wisdom.

In his time there was little administrative law, and I am sure that such as there was he did not regard as law at all. His ideas, which found utterance in many great law cases in the higher courts in New York and in the Supreme Court of the United States, were finally embodied, during the latter years of his life, in a series of twelve lectures destined to be delivered at the Harvard Law School when sudden death terminated his brilliant and scholarly career.

Recollections of Carter at Work

I can see him now working at a desk in the Bar Association Library on one of his briefs, writing it out in his own hand, and remaining there day after day until the brief was completed. He always made his own briefs, and they were models of learning and logical reasoning on

the fundaments of his case. On examining one of his arguments in a case in the Supreme Court you will find, in parenthesis, a phrase to the effect that "at this point, Mr. Carter proceeded for one hundred pages to discuss the history of uniform railroad rates."

With all this scholarship, erudition and absorption in the law, what struck the adolescent observer most was Mr. Carter's earnest and powerful personality. He always seemed to be exposing some great thesis bearing upon human conduct and human right. While never seeking public office, he was ever ready to lend his great weight and talent in righteous causes. As a young man he made a reputation in the Tweed prosecutions.

An Overpowering Sincerity

He had little sense of humor, nor did he possess that persuasive power in speech which so often proves useful in bringing courts around to the views of the advocate; but no one could hear him speak, whether in public or in private, without realizing his earnestness, his desire for the establishment of the truth, and a kind of over-powering sincerity. There was in Mr. Carter the dogmatism of the prophet, but also the compelling character of the prophet in his very earnestness.

Carter and Choate: A Contrast

He belonged to a small group of barristers, scarce more than a half dozen in number, who in the latter years of the Nineteenth Century were almost constantly engaged in litigation in the New York Courts. One of his frequent opponents as well as colleague was Mr. Joseph H. Choate. They were close friends, and upon Mr. Carter's death Mr. Choate wrote a memorial that is a literary gem as well as a vivid picture of the man himself. Choate—kind, fastidious, cynical, caustic; and Carter—solemn, earnest, philosophical. They seemed in strange contrast.

I have listened to them both in the courts with fascinated interest, and equally admired the divergent qualities that made these two leading barristers outstanding in the legal profession.

An Experience of a Neophyte

When a neophyte at the Bar, I remember an experience of my own with Mr. Carter that must have amused those in the court. He and my father were opponents in an important case involving an attempt to extinguish a corporation by indirect methods, other than those prescribed by statute. When one of the minor motions in the case came up, my father requested me to go to court to oppose it; and when I arrived there I found that Mr. Carter himself, and not one of his juniors, was to argue the motion.

I was naturally somewhat perturbed; but when it came my turn to oppose him, I raised some procedural objections which seemed valid to me and were calculated to defeat the motion, which he had argued so fully by bringing in the fundaments of the case and the objects at which he was aiming. When I finished speaking, he came over in most friendly fashion, and putting his arm on my shoulder he said: "My boy, your father would never have taken such a point as that." I must say that I felt a sense of relief when the judge said he would reserve decision and give the matter full consideration.

The Sherman Anti-Trust Act

One of Mr. Carter's most important arguments was made in the case of the *Trans-Missouri Freight Association* (166 U. S.). He contended against the unworkability of the Sherman Act and the necessity of construing it as merely declaratory of the common law.

I have often thought that had his argument been adopted by a majority of the Court the course of the anti-trust prosecutions might have taken a very different and perhaps much more intelligent direction. In that case he made clear his philosophy of the judge-made law and the ineffectiveness of statutes as against common law.

The Bering Sea Arbitration

Of all Mr. Carter's cases, his most distinguished case was that of the Bering Sea Arbitration. An account of that great arbitration, the significance and importance of which was never sufficiently appreciated by the Bar, has recently been written by Mr. William Williams, who was Assistant Agent in the case, and has been printed in the *American Journal of International Law* for October, 1943. It is an account which would well repay reading by any lawyer interested in the history of arbitration and especially by those interested in Anglo-American relations. In it is found the peculiar feature that the Court was called upon to play a double role.

In the first place, the Court was to decide certain definite questions of law as to the rights of the United States in the Bering Sea and its rights of property, protection or possession in the great seal herd. However, in addition to these questions, and assuming them to be decided in the negative, then the Court was to recommend certain regulations designed to protect the herd from the rapid extermination with which open sea capture threatened it. The argument took the widest extension, involving factually the habits of this strange animal in traversing the seas for thousands of miles during certain seasons of the year, and then returning to its breeding grounds in the United-States-owned Pribilof Islands.

Carter's Argument in the Arbitration

The leading counsel for the United States, in addition to Mr. Carter, were Edward J. Phelps and my father, Frederic R. Coudert. They were opposed by Sir Charles Russell (later Chief Justice of England), Sir Richard Webster, who followed Sir Charles as Chief Justice, and Sir Christopher Robinson, of the Canadian Bar.

It fell to Mr. Carter to open the case. He spoke throughout full court sessions during a period of some eight days. He answered the many

questions of the Court, and fully discussed the origins and history of property, and the philosophy underlying the idea of property, thus making a foundation for his claim that according to the law of nature, upon which all property was predicated, the fur seal was the property of the United States.

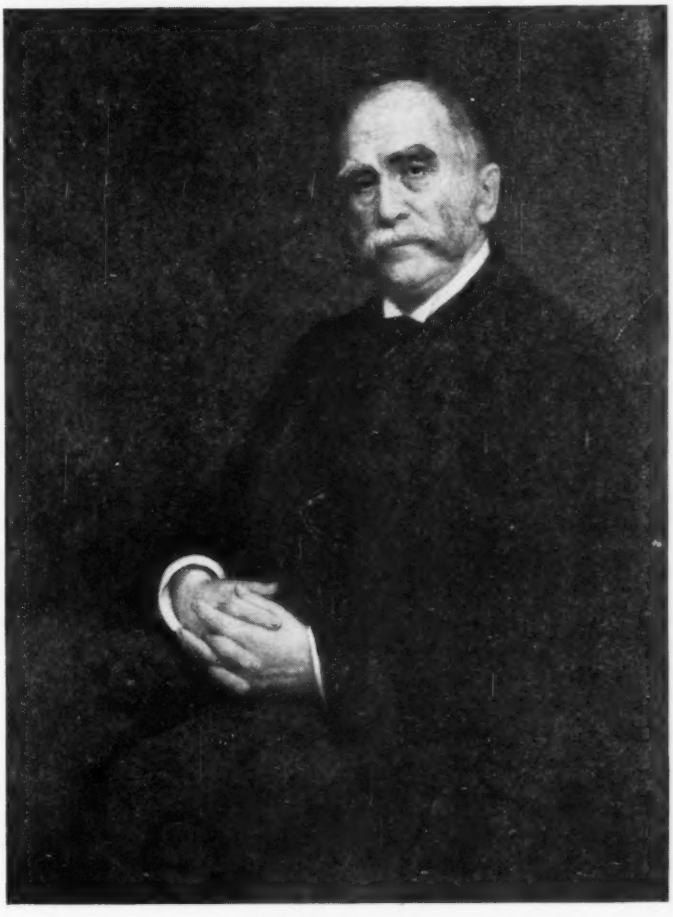
A Daring Thesis as to Property

The argument was one of fascinating interest, predicated as it was upon the theory that property was really a matter of trusteeship and that individuals and nations owned their property because the resources of mankind could thus be best served and most intelligently used. It was a daring thesis; and the presiding arbitrator, Baron Courcel, the famous French diplomat, interrupted the argument to say: "Mr. Carter, you are taking us far into the domain of socialism."

But Mr. Carter, in no wise deterred, insisted that trusteeship and trusteeship alone was the real basis for and justification of private property.

His colleague, Mr. Edward J. Phelps, our former Minister to England, a lawyer of highest ability, took a different view. He believed that we had established in the Pribilof Islands an industry which consisted in taking only the surplus males, who were merely an injury to the fur seal herd, and protecting the mother and young on the Islands during the breeding season. He argued that we had thus built up the seal herd, and that the killing of the female seals upon the high seas by indiscriminate slaughter incident to pelagic sealing meant the destruction of the great industry which had been built up by the United States.

The argument as to a closed sea and proprietary rights in the Bering Sea was not maintained vigorously by counsel for the United States because, as explained by Mr. Williams in the article above referred to, the Russian documents when properly translated did not bear out the interpretation first placed upon them by the State Department in its correspondence with Great Britain.



JAMES COOLIDGE CARTER

Preparation and Argument

Mr. Carter's argument was probably one of the most sustained and impressive, dealing as it did with fundamental legal and social questions, ever to be addressed to an international tribunal. It was, as Mr. Choate well said in his Memorial of Mr. Carter, prepared for the Association of the Bar of the City of New York (Annual Reports, Vol. 5, 1903-06, page 133).

> It was just the case for the exercise of Mr. Carter's characteristic qualities and methods in their very finest and highest forms.

Mr. Carter had spent many months in the preparation of his case; had examined not only every direct authority but every general treatise which might bear upon his theories.

At the end of his magnificent presentation, I well remember the admiration and exhilaration which the young secretaries and others of the United States Commission felt. We naturally wondered what Sir Charles Russell would say to such a magisterial argument. The next day Sir Charles arose—tall, handsome, clear-cut. With a rather strident voice and a peculiar precision in the enunciation of each word he began, as I remember it, as follows: "During the last week we have listened to the great argument of our learned friend, Mr. Carter. In hearing his exposition I am reminded of the young barrister who, having little precedent to sustain his case, when questioned cited to his Lordship the great Book of Nature, to which his Lordship interrupted to ask: 'And pray what page and what edition please, do you rely upon?' And so I say to you, Mr. Carter, 'what page and what edition, please?' And I pass on to argue the case from the standpoint of definite legal precedent."

Carter's Comments on an Ironic Argument

Sitting quite near Mr. Carter I

could not but observe the flush of anger with which our great protagonist listened to these ironic words. When the hour for adjournment came, we all went across the street to the American office. Mr. Carter, as was his custom, walked alone; and, after we had seated ourselves, he stood for a moment and looked about him. We were in breathless expectancy of what he would say regarding the irreverent remarks of the adversary. Raising his hand, he said: "Gentlemen, did you hear what that scoundrel said today!"

In hushed silence we listened to the wrath of the great barrister. The next day, however, the case proceeded as usual; and years afterwards, when the Chief Justice of England, Lord Killowen, came to our Bar Association, he was received by Mr. Carter, who made a most friendly and eulogistic address of welcome.

I have often thought how much better was the forensic settlement of international disputes than the soldier's way of doing it. The Bering Sea Arbitration had at one time aroused great feeling in the United States. Canadian ships had been seized; British cruisers had been ordered to the Bering Sea; and yet, after a summer of these forensic disputations, and after a decision by the Tribunal advising regulations minimizing pelagic sealing, the controversy passed almost forgotten into history.

Relations between the two Nations were in no wise impaired; the fur seal was saved, had increased in number, and a landmark had been set for the judicial settlement of international controversy.

Greatness of Personality and Character

It was a great privilege to have known Mr. Carter. I am sure that his influence was a formative one in the lives of many younger men. His belief in the law and its possibilities was of a mystic religious nature. His personality and his character were superb. His respect for the traditions of the Anglo-American Bar were of the highest. His was the life of a great barrister devoted to all that was noblest and best in his profession.

The memory of such a man should be kept green in our land. Men such as he are the spiritual descendants of the great lawyers who stood for English liberty, and who made and sustained our Constitution—a Madison, a Marshall and a Webster—and bulk large by reason of their role in our political and judicial history. The dignity and character of men like James C. Carter justly entitle them to be ranked as spiritual descendants of those great historical personages.

Excerpts from Joseph H. Choate's Memorial of James C. Carter

James Coolidge Carter was born at Lancaster in the State of Massachusetts, on October 14, 1827, and died in New York City, February 14, 1905—his life covering a period of seventy-seven years and four months, just two-thirds of the existence of the Government of the United States. He thus lived during the administration of twenty of our twenty-five Presidents. In this single lifetime our country grew from twenty-four States, with 12,000,000 of people, to forty-five, with 80,000,000 and 10,000,000 more in our conquered dependencies—made material progress such as no equal period of the world has witnessed in any country, and became a world power ready and able to take a just and leading part in international affairs—Mr Carter, coming into life with no advantages whatever but his own natural gifts stimulated by poverty and the spur of necessity, grew with the growth of the country and by sheer force of brains and character, had become at the time of his death one of her best known and most valued citizens, the acknowledged leader of the great profession of the law, foremost among its 110,000 votaries—and exercising a wide and powerful influence for good among the people of his time. Such a career is no accident, and it is interesting to recall as briefly as possible the steps by which he rose from obscurity to national and international distinction.

When I entered Harvard College in 1848, Mr. Carter, who had already been there for two years, was a very marked man among the three hundred students who then constituted the entire community of that little college. To very commanding abilities he added untiring industry, and to lofty character most pleasing manners, a combination which made him easily foremost. He was filled with an honorable ambition, and took all the prizes, and not content with perfection in the college curriculum, he took an interest in the public questions of the day, and cultivated the art of public speaking with discriminating assiduity. Like all the young men of that day he was a devoted admirer of Mr. Webster, who did more than any other man to kindle the patriotism and arouse the national spirit of the younger generation, and I always thought that he modeled himself upon that noble example in style, in expression and in the mode of treating every question that arose. Indeed in his last years I regarded him as the last survivor of the Websterian School. . . .

From lack of means, Mr. Carter found it a hard struggle to get through college, and even to enter it. For this reason he came two years late, having, I believe, engaged in some commercial employment to

(Continued on page 799)

Liberty and Order: Conflict and Reconciliation

by Ben W. Palmer
OF THE MINNEAPOLIS BAR

A LAWYER'S PRAYER

When God enbalanced the universe of suns,
Counted the myriad-laced snowflakes the little rivulet runs
Into the land-encaptured seas, the white and red blood cells,
The spiders' legs, the petals on the rose, the insect wings,
The vibrations of Orion's light, and every bird that sings
Lest multiplying endlessly their songs drown out the yells
Of catamount in unrestrained forests darkening the world,
He gave to molecule and monster and the constellations whirled
An ordered universe of liberty and law.
So may I humbly do my part
In building up through centuries the art
Of reconciling liberty and order,
Preserving man from the ever imminent maw
Of chaos, brutality, disorder.

A perennial problem of life is the reconciliation of principles of liberty and order. This is essentially the work of our lives as lawyers. And so we may ask our brother at the Bar: Do you ever feel that you resemble Sonja Henie, George III, Michelangelo, Plato, Aristotle, Shakespeare writing a sonnet? Or the whirling governor of an engine, a juggler of colored balls on the vaudeville stage, an acrobat, a child learning to behave or a baby to walk? For all of these struggle at the same reconciling Sisyphean task.

We in our offices strive to give our clients the largest measure of liberty of action within the interstices of a network of restraining law. In the courtroom we seek persuasion and conviction by the presentation of facts within the manifold restrictions of substantive and procedural law, the pleadings, limitations on the order of proof, the law of evidence, and the necessity of making a proper and intelligible record for purposes of appeal. With liberty we range afield in search of cases and statutes and evidence and then, as in the analogous systole and diastole of analysis and synthesis in the sciences, we reduce these to order for trial, argument and brief. We see with Aristotle and St. Thomas Aquinas that judgment is a union and separation, a synthesis preceded by analysis.

Conflict in Whole Field of Law

In the whole field of law the conflict rages between liberty and order. For Kant the first problem in law was the relation of law to liberty. The government of laws rather than men which Aristotle favored stands for authority, order, protection against arbitrary power, or as Dean Pound would say, against oriental justice. It promotes stability and by its certainty or predictability encourages economic enterprise.

But the government of men embodied in Plato's ideal judge introduces an element of liberty or discretion so that a case may sometimes be uniquely treated and liberty and progress freed from an iron rigidity of unyielding rule. For the problem of rule and discretion is a basic problem of the law at all times among all peoples.

The Libertarian Element in Law

In Anglo-American law the libertarian principle abating the rigors of the strict authoritative law is exemplified in equity, the growth of fictions, the general verdict of the jury, the discretion of police and prosecutor, parole, pardon, the indeterminate sentence, the use of standards by virtue of which many cases may be treated as unique upon their "peculiar facts", judicial technique in the choice of competing maxims or analogies and in determining the "controlling issues", the calculated generality of constitutional phrases, the weakening or avoidance of stare decisis by ignoring, "distinguishing" or overruling prior cases and the use of administrative tribunals.

The struggle is exemplified also in the conflict of legal philosophies, analytical, historical, realistic or

Ben W. Palmer writes this time of the perennial conflict between liberty and order, in men's march toward freedom, happiness and individual opportunity. His exposition gives perspective for the lawyer's part in this ageless task of reconciliation and adjustment. Above all, he emphasizes the need for an awareness of the individual lawyer's responsibility and role, if the profession of law is to regain its rightful leadership in the people's cause. His conclusions lead to the deeply religious and moral bases of law, liberty and order. The sonnet with which the article opens is his own.

functional, widening out through philosophies of government into the realm of philosophy in general. It is these philosophies in their shifting or consistent pressures upon the individual judge that determine his choice and proportion of ingredients for the judicial brew, in Cardozo's phrase: "logic, and history, and custom, and utility, and the accepted standards of right conduct." It is these that tell him when "symmetrical development" is "bought at too high a price." And it is the often unconscious loyalty or yielding to one of these philosophies that decides his preference as between liberty and authority.

Only Law Can Give Liberty

The paradox of the law was never better stated than by Goethe: "Only the law can give us liberty." You must be restrained, my brother, in order that I may be free. Otherwise we revert to the nasty and brutish state of nature of Leviathan where might makes right, nature is red in tooth and claw, and the law of the jungle rules.

The paradox of the law is also that involved in the basic problem of government: The reconciliation of liberty and authority, the claims and rights of the individual with those of the state. Heraclitus of Ephesus about 500 B. C. wrote: "The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license." Wentworth making his confession of political faith upon his impeachment said: "The happiness of a kingdom consists of a just poize of the King's prerogative and the subject's liberty." Burke, in posing the problem that faced the French Revolutionary Assembly, stated that which faced the makers of our Constitution during the critical period when the pendulum had swung dangerously far from order toward chaos: "To form a free government, that is to temper together the opposite elements of liberty and restraint in one consistent work." Ten years before he had said: "The liberty, the only liberty I mean is a liberty connected with order."

The Equipoise of Liberty and Government

In the opening of the *Social Contract,* Rousseau asked: "By what inconceivable art has a means been found of making men free by making them subject?" Radical Tom Paine said that the design and end of government is "freedom *and* security." Conservative Daniel Webster summarized as well as concluded his epic reply to Hayne: "Liberty *and* Union now and forever, one and inseparable." It is in the attempt to maintain the delicate equipoise of these conflicting forces that Montesquieu proposed a separation of governmental powers and that we have an independent judiciary. It is the success of this balance that explains the longevity of our Constitution. It also explains the controversy over and the perplexity of the problem of reconciling national liberties with a war-free world order or an organization of United Nations. And it is related to the struggle between *laissez faire* and a planned economy, frontier individualism in the law and the demand for order in an increasingly urban America.

The Oscillations in Balance

We need not accept without qualification cyclical theories of history, whether the dialectic be of Vico, Hegel or Marx, based upon or influenced by the swing of the pendulum down the ages from anarchy to tyranny through happy periods of moderated balance. But we would be blind not to see the oscillations. "Sargon's kingdom," says Rostovtzeff, "lasted for two centuries, approximately until 2625 B. C. Graddually, however, the centrifugal forces of the kingdom outweighed the centripetal and decomposition and feebleness set in."

Greece, Rome, France, England, Germany, America; all tell the same tale.

In the fourth century B. C. Greece was torn by political and social anarchy. As Rostovtzeff says, "The principle of autonomy for the individual city states had been victorious over the principle of unification." The contrast between the Greek with his intoxication with liberty ending in subjection and the Roman with his emphasis upon duty and his penchant for order is classic. "The Greek city-state in the two centuries of its development proved unable to create a national union of Greece and reduced Greece to a condition of political anarchy which must infallibly end in her subjection to stronger and more homogeneous government."

Reconciling Liberty with Order

Santayana has well said: "This is the nemesis of revolutions too: that in order to survive they must restore the tyranny which they destroyed." Rousseau's plangent phrase—"Man, born free, is everywhere in chains"—preceded the French Revolution and a dissolution of the political order. But later the "nemesis" came when Herault de Sechelles called for a dictatorship of Public Safety. "The moment has come," said he, "when a veil must be cast over the statue of liberty." And Marat cried out: "It is by violence that liberty must be established and it is indispensable that a momentary despotism of liberty should be established to crush the despotism of kings."

Finally we have Napoleon. Hailed at first as the man who would check the Revolution and reconcile liberty with order, he exclaims, later to be echoed by Carlyle, "Both the savage and the civilized man need a lord and master. . . . Obedience is man's duty; he deserves nothing better, and he has no rights." And repeating Louis XIV's "I am the state," he adds that "The laws of convention and morality cannot be applied to me", and crowns himself with his own hands in Notre Dame as Emperor of the French, arousing Beethoven's anger at the "hero."

Conflicts in English Legal History

As the conflict between liberty and order raged during the French Revolution so had it during that momentous battle between the House of

Commons standing for liberty and the Stuarts with their pretensions of Divine Right, followed later by the triumph of a newer authority in "Protector" Cromwell. Macauley saw in the Stuart period as in the later conflicts between Whig and Tory "the very crisis of the great conflict between Oromasdes and Arimanes, liberty and despotism," though later he was to recognize the need of Tory ballast as well as Liberal sail.

And when we come to the American Revolution we again find the problem of reconciliation. James Truslow Adams sums it up almost as we might state the problem of a league of nations: "The real question lay far deeper than constitutional quibbling over taxation. . . . Both English statesmen and Colonial leaders were feeling their way toward the solution of a problem that is perhaps insoluble, the reconciliation of freedom and empire."

The Struggle Between the States and the Union

So also in America Theodore Roosevelt saw the struggle in "the long contest between the nationalists and separatists which forms the central fact in our history for the first three quarters of our national life." Temporary coalescence of the colonies and people because of the inescapable necessities of war, anarchy within and dissolution of the bonds of union among the States during the critical period when the pressure of war was removed, precarious balance during the period of the Hartford Convention and the struggle over States' rights, a temporary "veiling of the statue of liberty" during the Civil War: Thus the pendulum swings under the Constitution of 1789.

Liberty vs. Dictatorship

S. L. Garvin, viewing the first World War as we view the second, said in 1924: "This wide and various struggle between liberty and dictatorship has been the most significant event of our generation, next to the war itself." And in Germany we have seen the oscillation from more than 350 states at the Treaty of Westphalia, through Frederick the Great and the Kaiser and the Weimar Republic to a now destroyed Hitler. Is it strange, then, that we have Spengler's cycle, Benjamin Kidd finding a socialized key to history in conflict between the individual and the state, Pareto speaking of history as a pendulum alternating between liberty and authority?

Thus Condorcet explained history as the result of the conflict between the tendency of man to enter the social state and a perpetual resistance to this tendency, ever threatening to dissolve it. And in our own day Sorokin teaches that Western society is just completing a sensate or individualist and beginning an ideational or collectivist period. So Toynbee uses the conception of Confucianism, Yin and Yang, the passive and the active principles, to account for historical growth.

Law and the Individual

What is true of law and government and peoples is obviously true of individual life. The success or happiness of the individual is measured by the extent to which he is able to satisfy his desires and achieve his purposes within the limits set by the laws of gravitation and of physics, conscience, morality, religious and educational teachings, customs and traditions of the family, village, nation and race, fashion, changing public opinion, the practices and ethics of profession or trade, positive law. The shades of the prison house close upon us, but we also find our freedoms in reconciling centrifugal forces of passion with centripetal powers of reason and will.

If the reconciliation of conflicting principles is not properly achieved, we have the problem child, the criminal, the social misfit. At one extreme there is the man that the law must collar; at the other perhaps Mr. Milquetoast overawed by these overwhelming authorities, or some mute inglorious Milton or village Hampden with unrealized capacities for self-assertion and achievement. And so we have insurgent, buoyant, aspiring youth in conflict with crabbed age with its inhibitions, its cautions and its emphasis upon authority.

Problems of the Individual Life

There is rebellious Rousseau like Bergson with his elan, vital glorifying instinct, repudiating external controls of impulse as against nature; as Babbitt said transforming "conscience itself from an inner check into an expansive emotion," believing that to "go out and mix one's self with the landscape is the same as doing one's duty." No wonder Rousseau called decorum "the varnish of vice," that he pursued delirium and vertigo for its own sake, was the greatest of anti-intellectuals, and said: "I was, if not virtuous, at least intoxicated with virtue." Rousseau never learned; Goethe did. The lusts of sensation, of power, and of knowledge were certainly expressed in "Werther," "Götz" and in "Faust." Faust seduces Margaret with the cry: "Feeling is everything." But Goethe, as he attained the Greek ideal of measure and proportion, saw that true culture is the result of discipline. He wrote in his journal: "A more definite feeling of limitation and in consequence of true broadening." And continuing the paradox, he said: "Anything that emancipates the spirit without a corresponding growth in self-mastery is pernicious."

The Ironic Conflict of Controls

Sophocles, Aeschylus and Euripides and their emulators, down to the creators of the latest Broadway or motion picture success, have seen that the essence of dramatic action lies in this ironic conflict. The battle may be with time and tide and circumstance, with the wills of other men, the Fates, the voice of conscience, the laws of nature, of man or of God. And in the field of education the conflict rages. Shall the emphasis be upon self-expression, an elective system, "education as play," or upon social conformity, stability, tradition, the mores of the community, studies that discipline the mind and will? Shall it be Dewey or Con-

fucius or a balance of the two? So also in the science of any age: Is the great need for analysis or synthesis? So also of that basis of all thought and speech: Definition. For definition itself involves a reconciliation or balance of the perennial conflict. It insures liberty within the definition by its authoritative exclusion of the extraneous.

Liberty Balanced Against Authority

Every product of literature and of art is the result of the creator's attempt to balance liberty against authority, and criticism is but an appraisal of his success. The poet has first his impulse, his passion, imagination, frenzy. But he must bring all these under control. He must bit and ride the horses of his inspiration lest they carry him too close to the sun and he be destroyed by incomprehensibility. So the genius of Shakespeare must be controlled by limitations of stage production or of the sonnet form. True artists "fret not at their convent's narrow room." For "in truth the prison in which" they doom themselves "no prison is." As Quintilian said: "Artistic structure gives force and direction to our thought." Voltaire chose to work in the French classic with its three unities and fixed forms. "We do not permit the smallest license", he said. "We require an author to carry without a break all these chains and yet he should appear ever free." Hamlet's advice to the actor applies to the poet. He too must "in the very torrent, tempest and whirlwind of passion, acquire and beget a temperance that may give it smoothness." How wrong was Carlyle when he said: "Alas, Shakespeare had to write for the Globe Playhouse: his great soul had to crush itself, as it could, into that and no other mould." For this "crushing" was an earmark of his genius.

So Chesterton speaks somewhere of an ecclesiastical patron who said to a painter: "There is a curiously shaped piece of wall in the angle of two pieces of vaulting in my church. I wish you to paint there the Temptation of St. Anthony." "What true artist," says the master of paradox, "would not rejoice in such terms, feeling himself inspired by the very narrowness of the conditions imposed." And have you not sometimes been inspired by the very narrowness of the terms imposed by a difficult lawsuit?

The Weighting of the Scales

According as the scales are weighted towards liberty or authority we have the romantic or the classic. The Elizabethan period, for example, was a "time of individualism, of progress and therefore, as we should expect, a time of initiative, activity, curiosity, invention, imagination." It was a spacious time "to vent the feelings, to satisfy the heart and eyes, to set free boldly on all the roads of existence the pack of appetites and instincts," says Taine. Even while Shakespeare lived the wave receded, and the trend toward the artificiality and controls of the Restoration set in. "He ought to have had the brakes put on him," Jonson said of Shakespeare. And Dryden later said of the Elizabethans: "Their wit was not that of gentlemen and it frequently descended to clenches."

So it is that we have in literature and the arts, as in life, convention and revolt, culture and anarchy, Tennyson versus Browning, Longfellow against Whitman, Sancho Panza and Don Quixote, imagination and reality, enthusiasm and necessity, passion and duty. We have Storm and Stress, Hugo, Delacroix, Rodin, the playwright's script and Hamlet's objection to *ad libbing*. There is fugue and boogie woogie and a Romanticist like Berlioz who was, as he said, "to make all barriers crack." But like other Romantics he sometimes, as Schauffler would say, "was wrecked on the reef of amorphism." And in music as in literature there are Gertrude Steins.

The Artists' Reconciliation

The composer struggles like the poet. He has his forms: sonata, symphony. There are the limitations of the human voice in pitch, power, tone, breathing and endurance even for "Wagnerian singers; of orchestras denied Tschaikowsky's cannon; of ordinary musicians, and even of virtuosi limited to ten fingers and hands of limited span. The conductor faces limitations as to liberties with the score, the capabilities of his players, accepted interpretations, the taste of time and place and patrons. Sculptor, painter, architect must curb their vaulting imaginative ambitions by ineluctable restraints of materials—bronze, marble, granite; limitations of space, size, proportions, perspective, lighting, the taste and purse of populace or patron. And with all these curbs the artist must reconcile liberty and authority in another way by achieving unity in variety.

For it is this "sanity in insanity" that is the basis of aesthetic appeal. The eye must be kept within the picture or upon the great rose window or cathedral facade by composition and unity of subject while it revels freely in beauty of detail. So there is beauty in the movement of a great athlete or dancer who achieves his purpose through and within the limitations of perfect form. There is beauty also in the unity in variety of a double play, or the infield moving in for a bunt, or players advancing a football. And there is also a terrible beauty in the grim co-ordination of a bombing crew or land, sea and air forces, even of the enemy.

Dominance of the Individual or Society

In another aspect of the struggle within the arts Faure has noted a rhythm or pulsation resulting from the alternating dominance of the individual and of society resulting in what the Saint-Simonians called critical and organic periods. "History," he says, "is like a heart that beats—like a fist that opens and closes. The older I grow, the more I observe, the more I notice how I live, the less can I conceive it possible to consider the history of peoples and the history of the mind otherwise than as a series of alternations, now rapid and now pre-

cipitous, of disintegrations through knowledge, and integrations through love. It is the rhythm that Laplace, Lamarck, Spencer catch in the evolution of the universal drama itself."

As to art, Newman says in his *Wagner*: "At bottom all form, all logic, in music, in fiction, in drama, in architecture, in sculpture, is one in object and process; a coherent whole has to be made out of parts, and the parts have to justify their existence by showing themselves indispensable to the whole." This was in the Platonic tradition that everything that is ordered has the mark of beauty in it. As Emerson put it: "Art, in the abstract, is proportion, or a habitual respect to the whole by an eye loving beauty in details." And Conrad in his preface to *The Nigger of the Narcissus* says: "Art in itself may be defined as a single-minded attempt to render the highest kind of justice to the visible universe by bringing to light the truth, manifold and one, underlying its every aspect."

Conflicts and Reconciliations in Philosophy

In philosophy as in art we find conflict and unity in diversity. About 450 B.C. Empedocles advanced the doctrine that the four essences—air, earth, water and fire—changeless in themselves, by their commingling and separation composed the varied and changing world. Two forces played upon these elements: A unifying force, love; and a separating force, hate. Tertullian wrote of God: "His Reason made the universe of things diverse, that all things should consist of a unity made of rival natures, such as void and solid, animate and inanimate, tangible and intangible, light and darkness. Yes! of life and death, too. The same Reason made a unity of Time also." "Philosophy," says Emerson, "is the account which the human mind gives to itself of the constitution of the world. Two cardinal facts lie forever at the base; the one, and the two. 1. Unity, or Identity; and, 2. Variety. We unite all things, by perceiving the superficial differences and the profound resemblances. But every mental act—this very perception of identity or oneness—recognizes the differences of things. Oneness and otherness. It is impossible to speak or to think without embracing both." As Goethe put it: "If you would refresh yourself from the Whole, you must see the Whole in the little."

Metaphysicians of the One and the Many

The history of philosophy since the Greeks represents largely a conflict between the metaphysicians of the One and the Many. The fundamental problem of ontology, the ultimate problem of thought, is the harmonizing of these concepts, the bridging of the chasm between unity and plurality. The Greeks discussed the problem of Universals, objects of a universal idea or concept. This was the great question of philosophy in the Middle Ages. Are *genera* and *species* things? What corresponds to these universals in the order of reality outside the mind? Are there only individual things? These questions are important because they touch the basis of all knowledge.

Scientists debate the question whether there is something analogous to free will in the sub-atomic world or merely action according to inescapable law. And like the philosophers they approach the problem of unity in diversity. It was Henry Adams who said: "If ever modern science achieves a definition of energy, possibly it may borrow the figure! Energy is the inherent effort of every multiplicity to become unity."

And in our own day we have seen a trend in the world of science away from analytical materialism toward idealistic synthesis. Sir J. Arthur Thomson points out that it "was reserved for the twentieth century to make one of the grandest unifications that the mind of man has achieved—that the source of all the power in the world is atomic." As Julian Huxley puts it: "There is but one type and store of energy in nature, whether it drives a train, animates a man, radiates in heat or light, inheres in a falling stone. There is but one substance." We need not agree with this; but it is significant, as is his further statement: "We assume that the universe is composed throughout of the same matter whose essential unity, in spite of the diversity of its so-called elements, the recent researches of physicists are revealing to us. . . . At the last all matter becomes, perhaps, indistinguishable or at least inseparable from energy." Sir James Jeans leaves out the "perhaps"; "Matter is electrical in structure so that all physical phenomena are ultimately electrical."

The Scientific Thinker and the Psalmist's God

And Eddington asserts that "the nature of all reality is spiritual, not material nor a dualism of matter and spirit." Finally, says Jeans, "If all this is so, then the universe can be best pictured, although still very imperfectly and inadequately, as consisting of pure thought, the thought of what, for want of a wider word, we must describe as a mathematical thinker." And we ask how far the scientist's "mathematical thinker" is from the Psalmist's God

"Who stretchest out the heavens
like a curtain;
Who layeth the beams of his chambers in the waters;
Who walketh upon the wings of
the wind;
Who maketh his angels spirits;
His ministers a flaming fire;
Who laid the foundations of the
earth."

The Lawyer May Gain Perspective

And so the lawyer, struggling to reconcile liberty with principles of order or authority, the better understands, and therefore views with compassion, the similar perennial struggle of poet, artist, literary craftsman and critic, of philosopher, moralist and statesman, and of all aspiring humanity.

And so may he the better play his part when the foundations of the earth are trembling and a new civilization is being born.

Orie L. Phillips: Senior Circuit Judge—Tenth Circuit

With this issue the JOURNAL starts a series of articles on the personalities and work of the eleven jurists who are the Senior Circuit Judges of the United States Circuit Courts of Appeals, including with them the Chief Justice of the District of Columbia.

Our purpose is, in the first place, to bring to the attention of the members of the Bar, and through them to the public, the fact that, despite any controversies or differences of opinion as to some Courts or judges, the judicial work of the Courts of Appeals and the District Courts of the United States is being carried on industriously, conscientiously, competently, and withal acceptably, in all parts of the United States. For the great bulk of cases, the Courts of Appeals are the tribunals of last resort.

Beyond this, we hope that this series will give a just measure of professional and public recognition, and of fair appraisal and deserved tribute, to the jurists who preside over and lead these important units of our federal judicial system. Few members of the Bar are acquainted with the personalities and the work of the judges of more than one or two Circuits—many not even with their own. It is no secret that in the opinion of many members of the Bar, there are more than a few Senior Circuit Judges, Circuit Judges, and District Judges, whose experience and proved capacity for judicial work richly entitled them long ago to promotion to the Supreme Court—a bench which they would have adorned and most soundly have served. The profession can at least make known its appreciation of their long and unremitting labors in behalf of an administration of justice fully in accord, in nearly all instances, with the American traditions of a competent, experienced and independent judiciary.

With this and succeeding articles should be read the objective 1946 Report of Director Henry P. Chandler of the Administrative Office to the Judicial Conference of Senior Circuit Judges convened by the Chief Justice on October 1. The summary and excerpts, published elsewhere in this issue, give a factual background as to the volume and the dispatch of work of the Courts of Appeals in the Ten Circuits and the District of Columbia.

First dealt with in the series is the Tenth Circuit and its beloved Senior Circuit Judge, Orie L. Phillips, of New Mexico and Colorado. Our "cover portrait" is appropriately of him. Other articles and portraits will be published from month to month as available, not necessarily in any predetermined sequence of Circuits or seniority of service. We shall hope that the series will contribute to an enhanced professional and public respect for the Courts, for the judges who serve in them, and for our judicial system as a cherished and characteristic American institution.

The *eleven* jurists to whom this series will be devoted primarily are:

First Circuit, Calvert Magruder
Second Circuit, Learned Hand
Third Circuit, John Biggs, Jr.
Fourth Circuit, John J. Parker
Fifth Circuit, Samuel H. Sibley
Sixth Circuit, Xenophon Hicks
Seventh Circuit, Evan A. Evans
Eighth Circuit, Kimbrough Stone
Ninth Circuit, Francis A. Garrecht
Tenth Circuit, Orie L. Phillips
District of Columbia, D. Lawrence Groner

The Tenth Judicial Circuit

The Tenth Circuit, created by taking six States from their former Circuits, is one of the largest in area, but not in population. It is comprised of Colorado, New Mexico, Wyoming, Kansas, Oklahoma and Utah.

The area of the Circuit is 561,261 square miles, or more than twelve times as large as the State of Pennsylvania. The population as shown by the 1940 Census was 6,593,628. There are eight districts in the Circuit, with four Circuit Judges, one retired Circuit Judge, ten District Judges, and one retired District Judge.

The Tenth is distinctive, as compared with most of the other Circuits, in that a variety of cases in special fields comes to its dockets, in addition to cases of the types appearing in all Circuits. The cases peculiar to the area of the Tenth include mining and irrigation law, public lands law, oil and gas rights, Indian Tribes and titles law, and community property law. Many of these cases have been of first impression. The opinions of this Court, particularly those of its learned Senior Circuit Judge, cover virtually the whole range of law.

The Circuit Judges of the Tenth Circuit are:

Wiley Rutledge, Circuit Justice, Washington, D. C.
Orie L. Phillips, Denver, Colorado
Sam G. Bratton, Albuquerque, New Mexico
Walter A. Huxman, Topeka, Kansas
Alfred P. Murrah, Oklahoma City, Oklahoma

Judge Phillips' Career

Orie Leon Phillips was born near Viola, in Mercer County, Illinois, on November 20, 1885, the son of

Edward and Susan (Thompson) Phillips. He was a student at Knox College, in Illinois, in 1903-04, and he received the degree of J. D. from the University of Michigan in 1908.

Removing to New Mexico, he was admitted to its State Bar in 1910. He practised law successfully at Raton until 1923. He was Assistant District Attorney of the Eighth Circuit (State) from 1912 to 1916, member of the State Senate from 1920 to 1923, floor leader of the Republican majority and Chairman of the Judiciary Committee.

In March of 1923, President Harding appointed him United States District Judge for the District of New Mexico. In the closing days of the succeeding administration, President Coolidge appointed him as a Circuit Judge for the Tenth Circuit. The appointment did not reach consideration by the Senate. President Hoover re-named him in April of 1929, and he was confirmed.

While he was a District Judge in New Mexico, he had been assigned many times to sit in the Court of Appeals for the old Eighth Circuit (before the creation of the Tenth). In that Court, he sat in 336 cases and wrote the opinions of the Court in 104 cases. His opinions are to be found first in 296 Federal Reporter. In the Tenth Circuit, he has sat in 1551 cases, has written the opinions of the Court in 602 cases, and has also written seven concurring and forty-five dissenting opinions. He thus has not been given to dissents, or to separate expressions of agreement with the majority in his Court.

He became Senior Circuit Judge in the Tenth on June 1, 1940.

His legal scholarship and his great capacity for sustained work led him to serve as a Visiting Professor of Law at Northwestern University in 1936 and 1937, and at the University of Michigan in 1938, to teach courses in constitutional law. He has also sat by special assignment in the Second and other Circuits.

Characteristic of the man has been his concept of the performance of his duties as a judge. His opinions give rise to the inference that he thinks that an opinion in a Court is not the place for a judge to indulge in dissertations on his legal philosophy. His habit seems to be that the opinion shall state plainly and concisely the material facts, shall lay down what the Court regards as the controlling principles of law which condition the result, and shall then apply those principles to the facts.

He seems always to have endeavored to write in plain, clear, and concise language, so as to leave no doubt as to the issues presented and the decision of the Court, avoiding metaphors and beauty of style where they might detract from certainty and clarity in expressing the legal principles and their applications to the facts in the case.

If he has consciously taken the style of any other jurist as a standard for his own opinion-writing, it would seem to be that of the late Mr. Justice Sutherland. With rare exceptions, it is difficult to cull from Judge Phillips' opinions many sentences which can be quoted as striking generalizations or apt aphorisms.

Expediting the Work of the Courts

Early in his career on the bench, Judge Phillips became convinced that if the Courts are to perform the function intended under our system of government, their processes must be expedited. "Not only must we have competent and impartial administration of justice in the Courts," he once declared, "but the disposition of cases must be accelerated. I do not mean by that that opportunity for full and fair hearing should not be given to litigants. But I think there should be sufficient judicial manpower, and each judge should be accorded sufficient personnel and adequate facilities so that cases can be promptly brought to issue, promptly tried, and expeditiously disposed of.

"I entertain no doubt that many controversies can best be adjudicated under processes that are traditionally judicial in character. We live in a rapidly moving age. Time is of the essence. Courts must be kept abreast of their dockets. Competent, efficient, and expeditious administration of justice will do more than anything else, in my judgment, to stop the tendency of this age to take from the Courts and give to administrative agencies what are and ought to be matters for exclusive determination of the Courts."

Practical Steps to Expedite

To those ends, since he has been Senior Circuit Judge, he has asked for and obtained two additional District Judges in the Circuit. He has not hesitated to assign judges from one district to another, wherever congestion appeared. Through his leadership and with what the Bar has recognized as the hearty cooperation of every judge in the Circuit, the dockets of the District Court in every district have been made current and the time between filing and disposition of cases has been very substantially decreased. The time between the filing of the case and its disposition in the District Courts in this Circuit now averages 5.9 months.

Since shortly after he became Senior Circuit Judge, the calendars of the cases on the docket in the Court of Appeals have been set for hearing every other month. This decreases the case load for disposition after hearing, enables the judges to examine the briefs and arguments and prepare conference memoranda while the oral arguments are fresh in their minds, and greatly expedites the disposition of cases. Every case that is ready for hearing is set down at each of these sessions; and with rare exceptions the opinions are down before the succeeding session of the Court. The Court is kept open at all times, and the opinions are filed immediately after they have been concurred in and the judgment entered. A case will be disposed of in the Court within six months or less after it is docketed and within two to six weeks after it is submitted on oral argument or on briefs.

Spirit of His Judicial Work

Members of the Bar have commented that there is a fine spirit among the

Court House and Post Office Building in Denver

Above the columns at 18th and 19th Sreets, which are the exterior walls of the Court-rooms in this beautiful structure built in 1916, are the inscriptions:

"*Lex nemini iniquum, nemini facit.*"
(The law causes wrong or injury to no one.)

"*Nulli negabimus, nulli differemus, justitiam.*"
(To no one shall we deny justice, nor shall we discriminate in its application.) Magna Charta.

In the Circuit Court of Appeals Hall and the Judges' Chamber the inscriptions are:

"*With law must the land be built.*"—Danish Proverb.

"*Reason is the soul of all law.*"—Sir R. Maltravers.

"*The noblest motive is the public good.*"—Anon.

"*What is law without justice?*"—J. Brooks.

"*The peace of society dependeth on justice.*"—R. Dodsley.

judges in the Tenth Circuit. At the Circuit Judicial Conferences, the Circuit and District Judges discuss their mutual problems and the methods adopted in their respective districts for improving the administration of justice. It is the opinion of their Senior Circuit Judge, without hesitancy, that every judge is doing his utmost to improve the administration of justice in the Tenth Circuit.

Judge Phillips' manner as presiding judge is characteristic of the man and his life. He is friendly, open-minded, firm, incisive, and patient, but he seeks instinctively the nub of the case, the point which controls its decision, not animadversions on the law or rationale of the subject in general. He instinctively assumes that lawyers before him know their case and how to present it, except in the rare instances where he finds that is not so. He does not like to have the time of his Court improvidently used.

The Judicial Conference of Senior Circuit Judges

With his realistic habits of mind and his aptitude for practicalities in improving the administration of justice, Judge Phillips has been since 1940 an effective member of the annual Conference convened by the Chief Justice. In the Conference he is the Chairman of the following Committees:

Bankruptcy Committee

Committee on the review of orders of the Interstate Commerce Commission and certain other administrative orders

Committee on the representation of District Judges in the Conference of Senior Circuit Judges

Committee on legislation to free from civil disability a probationer found by the Court to have met the conditions of his probation

Subcommittee on the Treatment of Youthful Offenders of the Committee on Punishment for Crime

What "Might Have Been" — And Nearly Was

Probably no American jurist ever came as near to being appointed to the Supreme Court of the United States without being actually named to the Senate for the place, as did Judge Phillips in 1932. A host of lawyers will never cease to regret that this did not come to pass. The unpublished story is interesting.

When Mr. Justice Holmes resigned in 1932, Attorney General William D. Mitchell recommended to President Hoover that Judge Phillips be appointed to fill the vacancy. The President told a number of friends, including several members of the Supreme Court, that the appointment had been decided on. Whether the report, current at the time, was correct, that the appointment papers to go to the Senate had been actually made out, we do not yet know.

At this juncture, the New York State Bar Association, then headed by Judge Samuel Seabury, proposed the appointment of Chief Judge Benjamin N. Cardozo, of the New York State Court of Appeals; and support for Cardozo became clamorous in the East. Fearing some possible difficulty as to the attitude of Senate Progressives toward the confirmation of Judge Phillips, President Hoover sent for Senator Borah of Idaho. Actually, the Senate Progressives, influenced by Senator Bronson Cutting of New Mexico, had investigated Judge Phillips' record on the bench and had decided to vote to confirm him.

Senator Borah immediately urged the appointment of Judge Cardozo. The President is reported to have said that he had considered the nomination of Judge Cardozo but had decided against it. A National political campaign was coming on. It was reported at the time that Senator Borah gave The President an impression that if Judge Cardozo were appointed, the friendship of the Progressives in the Senate might be regained. In any event, the nomination of Judge Phillips was not proceeded with, and Judge Cardozo was appointed and confirmed.

Judge Phillips' Work for the American Bar

Members of the Association hold him in especial affection and esteem because of his many years of arduous labors in many capacities, for the Association, the profession, and the public. In the Association, there is a long tradition that its presidency shall be held only by a practising lawyer. Probably no lawyer who has not been considered as eligible for the highest office in the leadership of the Association has done as much as he has for it over so long a period of time – quietly, modestly, self-effacingly, but always effectively.

His work goes back more than twenty years, when he became a tower of strength in the Committee on

Professional Ethics and Grievances, of which he was Chairman from 1940 to 1944. He helped to blaze the trail in that Committee's work on the Canons of Ethics and in its authoritative opinions; he stoutly maintained the independence and the quasi-judicial character of that Committee's work. The legislative powers of the House of Delegates could change the Canon or rule, but not the ruling.

He was President of the New Mexico Bar Association in 1921-23, a member of the old Executive Committee of the American Bar Association in 1929-32, Chairman of the Judicial Section in 1930-31 and 1943-44, long a member of the Council of the American Law Institute, President of the National Conference of Commissioners of Uniform State Laws in 1933-34, member of the American Judicature Society and the Colorado Bar Association.

Among the lawyers of his Circuit and throughout the country, he has won and held the respect, confidence, admiration and affection of a host of friends who have long deemed him worthy of still higher honors and opportunities.

Interest in International Law and Organization

His devotion to peace and justice among the Nations led him early to take an active as well as scholarly interest in international law and the efforts to establish organized cooperation in the international sphere. Despite the demands of his judicial duties and his work for many other good causes, he has found time to write and speak extensively on international subjects, chiefly before lay organizations, so that these vital matters shall be "understood of the people."

His contributions to the JOURNAL (see 30 A.B.A.J. 61; 30 A.B.A.J. 571; 32 A.B.A.J. 1) in outlining ways and means of accomplishing a progressive statement of international law as rules to guide the conduct of the Nations have commanded attention in many countries.

In March of 1944, he was appointed a member of the Association's new Committee, voted by the House of Delegates, to Consider and Report as to Proposals for International Organization. He has ever since been one of the most influential members of that Committee, and has done much to shape the Association's policy on those matters.

He has been zealous in behalf of the World Court, and has spared no efforts to further it. Last July, at the end of an arduous term of his Court, he flew by plane from Denver to Washington and back again, to fulfill a request that he appear and make a statement before a Senate sub-Committee that was considering the Morse Resolution (S. 196).

The volume and variety of his work for the Association, his profession, and his country, have truly been prodigious; and they have all been carried forward in addition to his burdens of judicial work.

Comment on Some of His Opinions

Space does not permit here an adequate survey of his opinions. They cover a long period of years and a great diversity of subjects. In *Kansas City Gas and Electric Company* v. *City of Independence, Kansas,* 79 Fed. 2d 32 and 638, he dealt at some length with the construction of the "general welfare" clause; and the views which he expressed were followed by the Supreme Court when the statute under scrutiny came before the Court in *United States* v. *Butler,* 297 U. S. 1, 64 *et seq.*

His dissenting opinions in the *Major Shepard* murder case, 62 Fed. 2d 683 and 64 Fed. 2d 641, are of interest because the views expressed in his dissents in the case, as to dying declarations, were followed by the Supreme Court (290 U. S. 96).

In his opinion in *Wootten* v. *Wootten,* 151 F. 2d 147, 149, 150, he laid down a high standard of conduct for trustees, saying:

> Many forms of conduct regarded as permissible for those acting at arm's length are forbidden to those bound by fiduciary ties. The standards of conduct for a trustee rise far above the ordinary morals of the market place. Not honesty alone, but a punctilio of honor the most sensitive is the standard of behavior required of a trustee. He must completely efface self-interest. His loyalty and devotion to his trust must be unstinted. Its well-being must always be his first consideration. These principles are inveterate and unbending.

Contrary to the expectations of some, he has not been disposed to hold statutes invalid, but has upheld them, in a great number of cases which could be enumerated. As a jurist trained in the ways in which the judicial process must be fulfilled in subordinate Courts of Appeal, he has followed faithfully the rulings of the highest Court as he understood them, without yielding to any temptation to substitute different views of the law or any divergent philosophy of his own. The views which he expressed in *Great Northern Life Insurance Company* v. *Read,* 136 Fed. 2d 44 (Oklahoma Gross Premium Tax Statute), were upheld by the Supreme Court in *Lincoln Life Insurance Company* v. *Read,* 325 U. S. 673.

In the *City of Independence* case, *supra,* he upheld the constitutionality of the National Industrial Recovery Act before the question came to the Supreme Court. His opinion in *Henderson* v. *Kimmel,* 47 Fed. Supp. 635, was the first to sustain the validity of the Emergency Price Control Act, under the "war powers". He has written many opinions upholding the claimed coverage of the Wage and Hour Act, although his often-cited opinion in *Jewel Tea Company* v. *Williams,* 118 Fed. 2d 203, held that the employees there involved were not within the coverage of the Act.

He was the author of eight or more opinions upholding the enforcement of orders of the NLRB. But in *Nevada Consolidated Copper Corporation* v. *NLRB,* 122 Fed. 2d 587, he wrote an opinion which refused to enforce such an order on the ground that the evidence did not sustain the Board's finding. That decision was reversed by the Supreme Court (316 U. S. 105).

So far as we are able to find, in his nearly twenty-four years of judi-

cial tenure, Judge Phillips has written only one opinion holding a legislative enactment unconstitutional. *Southwest Utility Ice Company and New State Ice Company* v. *Liebmann,* 52 Fed. 2d 349, held a part of an Oklahoma statute to be unconstitutional. That ruling was affirmed by the Supreme Court in a famed decision *(New State Ice Company* v. *Liebmann,* 285 U. S. 262).

Many cases on appeal in the Tenth Circuit involve Indian land titles of the Five Civilized Tribes and the Osage Indians in Oklahoma. He has written the opinion of the Court in very many of these. One of the latest and most important was in *United States* v. *Champlin Refining Company,* decided July 29 and not yet reported. In irrigation law also, his background of experience and special learning has made him the spokesman for the Court in many of the cases which come to it. His opinion in *Murphy* v. *Kerr,* 296 Fed. 536, covers practically all of the fundamentals of irrigation law. It was the case of first impression in that it involved the application of the principles of water rights in the arid States of the West to the pumping of water by one person to the land of another, for the purpose of irrigating the lands of the latter. His opinion laid down all the fundamental principles of the doctrine of water rights in the arid States and applied those principles to the facts presented. Although it was a District Court decision, it has been cited many times by State and Federal Courts, including the Supreme Court of the United States (325 U. S. 614).

Perhaps his most important Federal tax decisions are *O'Meara, National Bank of Topeka, and Elmhurst Investment Co.* v. *Commissioner,* 34 Fed. 2d 390; *Grant* v. *Commissioner,* 150 Fed. 2d 915; *Bradshaw* v. *Commissioner,* 150 Fed. 2d 918; and *Hammonds* v. *Commissioner,* 106 Fed 2d 420, an income tax case involving the community property law of Texas. Even admiralty law has come within his ken. In *Seaboard Sand & Gravel Corp.* v. *Moran Towing Corp.,* which was a case of first impression on the point of the right of an owner to maintain an action against a subcharterer, reported in 154 Fed. 2d 399, a case in which he sat in the Second Circuit, he sustained the right to maintain the action on the principle of the law of bailments.

Perhaps the most vigorous and lengthy dissent he ever wrote, and one of the most important, was on last April 30 in *Cities Service Gas Co.* v. *Federal Power Commission,* 155 Fed. 2d 694, in which the majority of the Court felt that the valuation questions in a rate proceeding were foreclosed by the decisions of the Supreme Court. Judge Phillips wrote spiritedly to the contrary and voted to set aside the Commission's order.

One of the most important fields of patent litigation in the Tenth Circuit are the cases which involve the "cracking" processes for refining petroleum. He wrote the opinion in *Gasoline Products Co.* v. *Champlin Refining Co.,* 86 Fed. 2d 552, which involved many important questions in that phase of patent law. Another important opinion which he wrote as to the "cracking" process is *Texas Co.* v. *Anderson-Prichard Refining Corporation,* 122 Fed. 2d 829.

The foregoing selections at random from many volumes of the reports may serve to illustrate the many-sidedness of the work of the Courts in the Tenth Circuit, their importance to American law as well as to the lawyers and clients involved, and the fidelity and competence with which their issues have been heard, weighed, and decided.

Interested in Politics?

"Politics shapes our lives. It takes us in and out of wars. It decides whether men will have steady jobs, women will have decent homes, children will have a chance to grow up healthy and fit for adult life. You may take no interest in politics, but you may depend upon it, politics takes an interest in you. So if you do not want to be a miserable pawn on the board, pushed around to suit somebody else's convenience, make up your mind to take a keen interest in politics."

—J. B. PRIESTLEY

The Legislative Reorganization Act of 1946

by Aaron L. Ford

OF THE DISTRICT OF COLUMBIA BAR*

Here is an article which every practising lawyer should read carefully, to help his work for clients. The new legislation as to the presentation, settlement or trial of tort claims against the Government are important to you. Former Congressman Ford's statement of the misunderstood provisions as to the registration, etc., of so-called "lobbyists", should be noted. Of course, his account of the efforts of the Congress to reorganize and staff its work, so as to fulfill its place in the constitutional plan of Government, should greatly interest all lawyers and citizens.

Article 1. Section 5, Clause 2, of the Federal Constitution says that "Each House may determine the Rules of its Proceedings". This provision of the Constitution being the supreme law of the land, the Senate or House of Representatives in the next or any succeeding session of Congress may by appropriate resolution adopt new rules relating to their proceedings or create new committees, notwithstanding the enactment of the Legislative Reorganization Act of 1946.[1] But there are also many other things in the latter statute.

Background

For many years the Executive Branch has requested, and the Congress has granted it, extraordinary powers to meet emergency needs. Complaint has arisen respecting the use of many of those grants. The situation became the target for criticism. Congress was strongly urged to reorganize and re-assert itself as a coordinate branch of the Government.

On February 11, 1943, the House of Representatives created a Special Committee to investigate acts of executive agencies in excess of their statutory or constitutional authority.[2] The Committee submitted seven reports,[3] of which the seventh pointed out that most important bills were drafted by the Executive officials intended to be the recipients of the powers.

The Committee recommended that Congress establish a permanent Joint Senate and House Legislative Staff Service, for the purpose of enabling the standing legislative Committees of Congress to obtain expert, unbiased, and independent analysis of proposals. The Committee also recommended the establishment of a permanent Joint Senate and House Committee on Appropriations, to investigate and study the manner in which the Executive Branch spends funds, the establishment of a permanent Joint Senate and House Committee on Executive Agencies and Procedures to investigate whether the laws are executed and administered according to the intent of Congress, and the creation of a Joint Committee of the House and Senate to study the organization and operation of Congress and recommend improvements to enable the Congress to meet its responsibilities.[4]

The 1946 Report of the Joint Committee

Meanwhile, a Joint Committee of the two Houses of Congress was created for a full and complete study of the organization and operation of the Congress.[5] On March 4, 1946, one hundred and fifty seven years to a day after the convening of the first Session of the first Congress, the Committee submitted a report containing thirty-seven specific recommendations for the modernization and improvement of the operations of Congress and stating in part that:[6]

> Our committee was created in response to a wide-spread congressional and public belief that a grave

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1. Public Law No. 601, 79th Cong. 2d Sess., approved August 2, 1946.

2. H. Res. 102, 78th Cong. 1st Sess. Howard W. Smith of Virginia, Chairman; John J. Delaney of New York; Hugh Peterson of Georgia; Jerry Voorhis of California; Fred A. Hartley, Jr. of New Jersey; John Jennings, Jr. of Tennessee; and John B. Bennett of Michigan. Representative Bennett shortly resigned and Representative Clare E. Hoffman of Michigan was appointed to fill the vacancy.

3. House Reports 699, 862, and 898, 78th Cong. 1st Sess.; House Reports 1024, 1366, 1797, and 1912, 78th Cong. 2d Sess.

4. A bill embodying these recommendations was introduced in the House of Representatives by Congressman Howard W. Smith of Virginia on November 20, 1944. H. R. 5485, 78th Cong. 2d Sess.

5. S. Con. Res. 23, 78th Cong. 1st Sess., introduced by the late Senator Francis Maloney of Connecticut, and H. Con. Res. 54, 78th Cong. 1st Sess., introduced by Representative A. S. Mike Monroney of Oklahoma. They were identical. The following were the members of the committee: Representatives Monroney of Oklahoma; Cox of Georgia; Lane of Massachusetts; Michener of Michigan; Dirksen of Illinois; and Plumley of Vermont. Senators Maloney of Connecticut; Thomas of Utah; Pepper of Florida; White of Maine; Brooks of Illinois; and La Follette of Wisconsin. Senator Russell of Georgia was appointed a member of the committee, on February

> constitutional crisis exists in which the fate of representative government itself is at stake. Public affairs are now handled by a host of administrative agencies headed by nonelected officials with only casual oversight by Congress. The course of events has created a breach between government and the people. Behind our inherited constitutional pattern a new political order has arisen which constitutes a basic change in the Federal design. Meanwhile, government by administration is the object of group pressures which weaken its protection of the public interest. Under these conditions, it was believed, the time is ripe for Congress to reconsider its role in the American scheme of government and to modernize its organization and procedures.

The bill containing the recommendations of the committee was introduced in the Senate by Senator La Follette on May 13, 1946, agreed to in the Senate on June 10, passed by the House of Representatives on July 25, and signed by The President on August 2, 1946.

CONGRESSIONAL REORGANIZATION ACT

Titles I and II of the Act relate directly to legislative operations. Titles III, IV, V and VI are related to that purpose but have additional direct effects.

Senate

Part I of Title I substantially amends Rules XVI and XXV of the standing Rules of the Senate. Beginning with the convening of the 80th Congress in January of 1947, the present Standing Committees of the Senate are reduced in number from 33 to 15.[7] Heretofore Senators have been permitted to serve on an unlimited number of Committees; but hereafter, under the amended rule, a Senator may not serve on more than two Standing Committees of the Senate, except that those of the majority party who are members of the Committee on the District of Columbia or the Committee on Expenditures in Executive Departments may serve on three Standing Committees.

The amendment to Rule XVI prohibits the Senate Committee on Appropriations from reporting an appropriation bill containing amendments proposing new or general legislation. It provides that the Senate shall not receive an amendment to an appropriation bill which proposes general legislation or is not germane or relevant to the subject matter contained in the bill. It also prohibits amendments to any item or clause of such bill which do not directly relate thereto and forbids the placing of any restriction on the expenditure of funds appropriated if the restriction is unauthorized by law and if such restriction is to take effect or cease to be effective upon the happening of a contingency.

House of Representatives

Part 2 of Title I substantially amends Rules X and XI of the Standing Rules of the House of Representatives. Beginning with the next Congress, the present Standing Committees of the House of Representatives are reduced in number from 48 to 19.[8] In the past, membership on one of the major Committees in the House of Representatives was considered a full-time job for those members belonging to the majority party, but a member could serve on minor Committees without limitation as to number.

Hereafter, under the amended rule, members of the House may not serve on more than one Standing Committee, except that members who are elected to serve on the District of Columbia Committee or on the Committee on Un-American Activities may be elected to serve on two Standing Committees, and members of the majority party who are elected to serve on the Committee on Expenditures in the Executive Departments or on the Committee on House Administration may be elected to serve on two

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12, 1945, to fill the vacancy caused by the death of Senator Maloney. Senator Maloney passed away on January 16, 1945, and Senator Robert M. La Follette, Jr., was elected Chairman of the committee on March 3, 1945. On January 11, 1945, early in the first Session of the 79th Congress, Senator Maloney introduced a Resolution to recreate or continue the Committee. S. Con. Res. 7. This Resolution was presented to the Senate by Senator Barkley of Kentucky for Senator Maloney during Senator Maloney's last illness. On January 11, 1945, Representative Monroney introduced a Resolution in the House of Representatives to recreate or continue the committee. H. Con. Res. 18. This Resolution passed the House on January 18, 1945, and was agreed to with amendments in the Senate on February 12, 1945. The House of Representatives concurred in the Senate amendments on February 19, 1945. The same Members were reappointed or continued to serve on the Committee and the actual study and report was made pursuant to H. Con. Res. 18, 79 Cong., 1st Sess.

6. "The Committee held 39 public hearings and four executive sessions between March 13 and June 29, 1945. The testimony of 102 witnesses was taken, 45 of whom were Members of Congress. In addition, 37 Members and many interested private citizens submitted written statements"; Senate Report No. 1011, 79th Cong. 2d Sess., page 1; House Report No. 1675, 79th Cong. 2d Sess., page 1.

7. Sections 102, 103, and 104 of the Revised Statutes of the United States are not an unconstitutional invasion of the right of the Houses of Congress to make their own rules, inasmuch as those bodies may act by statutes as well as by rules. *Chapman* v. *U. S.* (1896), 8 App. D. C. 302; *In Re Chapman* (Dist. Col. 1897), 166 U. S. 661, 17 S. Ct. 667, 41 L. Ed. 1154. This abolishes the Senate Committees on Audit and Control, Claims, Commerce, Enrolled Bills, Immigration, Indian Affairs, Irrigation and Reclamation, Interoceanic Canals, Library, Manufacture, Military Affairs, Mines and Mining, Naval Affairs, Patents, Pensions, Post Offices and Post Roads, Printing, Privileges and Elections, Public Buildings and Grounds, and Territories and Insular Affairs. At the same time the amendment to Rule XXV creates new Standing Committees of the Senate on Armed Services and on Public Works; and it changes the names of the Standing Committees on Education and Labor, Interstate Commerce, Public Lands and Surveys, and Rules to Labor and Public Welfare, Interstate and Foreign Commerce, Public Lands, and Rules and Administration.

8. This abolishes the House Committees on Accounts; Census; Claims; Coinage, Weights and Measures; Disposition of Executive Papers; Election of President, Vice President, and Representatives in Congress; Elections No. 1; Elections No. 2; Elections No. 3; Enrolled Bills; Flood Control; Immigration and Naturalization; Indian Affairs; Insular Affairs; Invalid Pensions; Irrigation and Reclamation; Library; Memorials; Military Affairs; Mines and Mining; Naval Affairs; Patents; Pensions; Printing; Public Buildings and Grounds; Revision of the Laws; Rivers and Harbors; Roads; Territories; and War Claims. At the same time the amendment to Rule X creates new Standing Committees of the House of Representatives on Armed Services and on House Administration and Public Works, combines the Civil Service and Post Office and Post Roads Committees as well as the Education and Labor Committees into new Committees on Post Office and Civil Service and Education and Labor, and has the effect of changing the name of the Committee on World War Veterans' Legislation to the Committee on Veterans' Affairs.

Standing Committees. Rule XI has been broadened to permit the Committees on House Administration, Public Works, Public Lands and Veterans' Affairs to report at any time on certain matters; heretofore this privilege was pretty much limited to the Committees on Accounts, Appropriations, Rules, and Ways and Means when reporting revenue measures.

Subpena Powers

Section 134 (a), Part 3, Title 1, authorizes each Standing Committee of the Senate, including any subcommittee of any such committee, to hold hearings and to require by subpena or otherwise the attendance of witnesses or the production of correspondence, books, papers, and documents. With the exception of the Committee on Appropriations, which is authorized to conduct investigations under Section 202 (b) of Title II, no Standing Committee of the House of Representatives is authorized to subpena witnesses or conduct investigations.

Budget and Revenue

The Government is the largest single spender of money. Raising revenue with which to finance its various departments and operations is a continuing as well as a tremendous problem. It has often been suggested that the members of the Appropriations and revenue-raising Committees of the Congress should meet and give closer consideration to the relationship between income and expenditures. Section 138 (a), Part 3, Title I, provides for a joint meeting of the revenue-raising and appropriations Committees of the two Houses at the beginning of each regular session of Congress, and contemplates joint action on the adoption of an overall legislative budget.

Legislative Aid

While all of Title I of the Act deals with changes in Rules of the Senate and House of Representatives and is subject to the will and pleasure of the two Houses with reference to their own affairs, the other five titles of the Act become a part of the substantive law.

Committee Staffs

Subject to annual appropriations, the Committee on Appropriations of each House is authorized to appoint such staff by a majority vote as it shall determine to be necessary. Each of the other Standing Committees of the Senate and House of Representatives is authorized to appoint, by a majority vote of the Committee, not more than four professional staff members in addition to the regular clerical staffs of such committees.

The professional staff members of the Committees are to receive annual compensation fixed by the Chairman and ranging from $5,000 to $8,000, and the clerical staff is to receive compensation ranging from $2,000 to $8,000. Section 202 (f), Part 1, Title II, provides that no Committee shall appoint to its staff any experts or other personnel detailed or assigned from any department or agency of the Government, except with the written permission of the Committee on Rules and Administration of the Senate or the Committee on House Administration of the House of Representatives, as the case may be. Section 202 (g), Part 1, Title II, provides that no individual who is employed as a professional staff member of any Committee shall be eligible for appointment to any office or position in the Executive Branch of the Government within a period of one year after he shall have ceased to be such a member.

Legislative Reference Service

The Legislative Reference Service began functioning as a division in the Library of Congress about 1914. It appears to have received its first appropriation ($25,000) as such a division in the Legislative Appropriation Act of 1915. Its first work consisted of preparing indexes and digests of the laws but this was soon enlarged to permit it to supply information to committees and members of Congress. During the fiscal year ending June 30, 1946, the Legislative Reference Service received an appropriation of nearly $200,000.

AARON L. FORD

Section 203 (a), Part 1, Title II, now establishes the Legislative Reference Service as a separate department in the Library of Congress. Its function is: (1) On request to assist any committee or joint committee of either House in the analysis, appraisal, and evaluation of legislative proposals or recommendations submitted by The President or any Executive agency, to assist otherwise in furnishing a basis for the proper determination of measures; (2) On request or upon its own initiative in anticipation of requests to gather, classify, analyze, and make available, in translations, indexes, digests, compilations, bulletins, and otherwise data bearing upon legislation without partisan bias in selection or presentation; and (3) To prepare summaries and digests of hearings, bills and resolutions.

Section 203 (b) (1) provides that a director, assistant director, and all other necessary personnel be appointed by the Librarian of Congress, without regard to the civil-service laws, without reference to political affiliations, and solely on the ground of fitness.[9]

Legislative Counsel

On February 24, 1919, Congress established a Legislative Drafting

Service to afford to Committees expert assistance in drafting public bills and resolutions.[10] The name was changed to Office of the Legislative Counsel on June 2, 1924, and placed under the direction of two Legislative Counsels, one to be appointed by the President *pro tempore* of the Senate and the other to receive his appointment through the Speaker of the House of Representatives.[11] During the fiscal year ending June 30, 1946, $90,000 was appropriated to the Office of the Legislative Counsel.[12] Section 204, Part 1, Title II, now authorizes appropriations for the work of the Office of the Legislative Counsel in the following amounts for the fiscal years ending June 30: 1947, $150,000; 1948, $200,000; 1949, $250,000; 1950, $250,000; and such sums as may be necessary for each fiscal year thereafter.

Comptroller's Audits

Before the passage of the Legislative Reorganization Act of 1946, it was the duty of the Comptroller-General to conduct audits for the purpose of determining whether the departments and agencies of the Government were spending funds as authorized. Section 206, Part 1, Title II, now authorizes and directs the Comptroller-General to make an expenditure analysis of each agency in the Executive Branch (including Government corporations), to enable Congress to determine whether public funds have been economically and efficiently expended.

Regulation of Lobbying

Title III is often referred to as the Anti-lobbying Act. Such a reference is a misnomer, for there is nothing whatever in the Act that prevents lobbying. The important part of this title is found in Section 307. What the Act really intends to accomplish is to bring about registration, and a statement of receipts and expenditures, on the part of any person who by himself or through another in any manner directly or indirectly solicits or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in securing or influencing the passage or defeat of any legislation by the Congress of the United States.

Section 308 (a) provides that any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and furnish certain information; but persons who merely appear before committees of the Congress of the United States in support of or in opposition to legislation are expressly exempted from the requirements of Section 308. Section 310 (a) provides criminal penalties for violations and Section 310 (b) provides in addition that any person convicted is prohibited for three years from attempting to influence directly or indirectly the passage or defeat of any proposed legislation or from appearing before a committee of the Congress in support of or in opposition to proposed legislation.

Tort Claims Act

In considering the Legislative Reorganization Act of 1946, Congress was faced with the question of how it could best handle the large number of tort claims. It could continue to handle them through private bills just as it had done in the past; it could give the heads of the federal agencies power to make adjustments or settlements; or it could make the United States amenable to suit in the Courts. It chose what might be termed a combination of the two latter courses.[13]

Small Claims

Where the total amount of the claim does not exceed $1,000, under Section 403 (a), authority is now conferred upon the head of each federal agency to determine and settle any claim for money against the United States accruing on and after January 1, 1945, on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death, in accordance with the law of the place where the act or omission occurred.[14] Larger claims are committed to the Courts.

Suits

Subject to stated exceptions,[15] Section 410 (a), Part 3, provides that the United States District Courts (for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred), sitting without a jury, shall have exclusive jurisdiction to determine and enter judgment for money on any claim against the United States accruing on and after January 1, 1945, on account of damage to or loss of property or personal injury or death caused by the negligent or

(Continued on page 808)

9. Section 203 (b)(2) authorizes the Librarian of Congress to appoint in the Legislative Reference Service senior specialists in the following broad fields: agriculture, American government and public administration, American public law, conservation, education, engineering and public works, full employment, housing, industrial organization and corporation finance, international affairs, international trade and economic geography, labor, mineral economics, money and banking, price economics, social welfare, taxation and fiscal policy, transportation and communications, and veterans' affairs. For the work of the Legislative Reference Service (203)(c) authorizes the appropriation of $550,000 for the fiscal year ending June 30, 1947; $650,000 for the fiscal year ending June 30, 1948; $750,000 for the fiscal year ending June 30, 1949 and such sums as may be necessary thereafter to carry on the work of the Service.

10. 40 Stat. 1141.

11. 43 Stat. 353; see also 55 Stat. 726.

12. Public Law No. 85, 79th Cong. 1st Sess.

13. A somewhat similar bill passed both Houses but was given a "pocket veto" by President Coolidge. H. R. 9285, 70th Cong.

14. Similar legislation has been in effect for some years.

15. Section 421 exempts from the title: "(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part

Report of the Administrative Office of the United States Courts

The practical workings of the Courts of the United States, and their dispatch of the many types of litigation which come to their calendars, are of direct concern to all practising lawyers. The objective Report of Director Henry P. Chandler of the Administrative Office of those Courts will be scanned with great interest. Unfortunately, the Report of the Judicial Conference of Senior Circuit Judges will not be released until after this issue has gone to press. It will be summarized in our December issue.

On October 1, the opening day of the 1946 Judicial Conference of Senior Circuit Judges, Henry P. Chandler, the Director of the Administrative Office of the United States Courts, submitted his Report for the year ended June 30, 1946. Mr. Chandler, who is *ex officio* a member of the House of Delegates of the American Bar, reviewed in many interesting details the work of the federal judicial system as a whole.

Trends in the Federal Judicial Business

According to the report, the nature of the litigation in the federal courts continues to be affected by the recent war, but in lessening degree, and signs of a return to more normal conditions are beginning. The number of civil cases brought in the District Courts went up eleven per cent as compared with fifty-eight per cent in the previous year. Civil cases in which the Government was a party went up something less than six per cent as compared with more than 100 per cent in the previous year.

Civil suit on account of price regulations went up only about nine per cent, as compared with more than 300 per cent the year before. Private civil cases went up twenty-four per cent as compared with one and one-half per cent the previous year, and the number of private cases was rising towards the end of the year, indicating that the increase might be the beginning of a trend.

In a time in which there seems to be a general increase in crime, the report shows that the number of criminal cases brought in the federal courts went down sixteen per cent. The number of criminal cases pending at the end of the year, 8,316 was the lowest at any time in the last fifty years. There was a decrease in cases under the Selective Service Act, also in criminal cases for the violation of price regulations (in contrast with the increase in civil cases on this account), and also in Internal Revenue liquor cases.

The darker side of the picture is that prosecutions for interstate automobile thefts nearly doubled, with the resumption of the free use of automobiles; and juvenile delinquency cases continued to rise, reaching twice the number only five years ago. The rising proportion of crimes committed by young persons is a somewhat ominous portent for the future unless measures for the rehabilitation of the offenders can be made effective.

Bankruptcy cases filed, which the year before were the lowest number in any year since the enactment of the Bankruptcy Act in 1898, fell off another twenty per cent. The rate of filing throughout the year was, however, substantially uniform, indicating that the bottom may have been reached. The number of such cases filed was little more than a seventh of the number filed ten years before. Naturalization petitions, which had been going down previously, dropped again thirty-five per cent.

Circuit Courts of Appeals

Because the JOURNAL is starting in this issue a series of articles concerning the Senior Circuit Judges of the Circuit Courts of Appeals, and the work of their Courts, we set forth from Director Chandler's Report the data given.

The number of cases commenced in the Circuit Courts of Appeals in 1946[1] continued the declining trend which has been in evidence since 1940. The volume was 2,627 new cases, a decline of 3.8 per cent compared with 1945. Appeals in civil actions, both those in which the United States was a party and those between private litigants (up eighteen per cent), increased in number, while criminal, bankruptcy, administrative agency and other appeals decreased. In the administrative agency appeals the largest decrease was in cases from The Tax Court of the United States, which declined from 331 in 1945 to 267 in 1946.

The number of cases terminated was 2,621 so that the number of cases pending at the end of the year, 1,531, was virtually the same as the number

1. Where years are referred to in the Report, they are fiscal years unless otherwise stated.

at the beginning, 1,525. Cases disposed of after hearing or submission numbered 1,805, compared with 1,992 the previous year, a decrease of 9.4 per cent. Private cases (894) and civil actions in which the United States was a party (690) constituted three-fifths of the new business with cases from administrative agencies (418), criminal cases (400), and bankruptcy cases (165) making up other important parts of the total.

A ten-year summary of cases docketed in the Circuit Courts shows that the decrease of about 20 per cent during that period has been due to a diminution in appeals from the Courts while appeals from administrative agencies, which rose from 1937 to 1942, have now returned to the level of a decade ago. Appeals from The Tax Court of the United States, the National Labor Relations Board and the Federal Trade Commission—the three agencies with the largest number of cases—show a similar trend; but in 1946 tax appeals were considerably below 1937 numbers and Labor Board appeals were above the number ten years ago. The detailed figures are as follows:

Cases Filed in the Circuit Courts of Appeals.[2]

	1937	1938	1939	1940	1941	1942	1943	1944	1945	1946
Total Appeals	3277	3281	3318	3505	3213	3228	3093	3072	2750	2627
Appeals from Courts	2754	2633	2587	2561	2404	2369	2226	2298	2168	2188
Administrative Appeals	416	540	649	800	803	835	826	717	511	418
Appeals from Federal Trade Commission	12	45	31	23	23	47	26	51	26	4
Appeals from National Labor Relations Board	13	85	196	306	248	248	275	183	108	107
Appeals from The Tax Court of the United States	357	338	356	414	462	479	469	447	331	267

The number of cases disposed of in the Circuit Courts was only six less than the number filed. The Second Circuit, with 450 cases disposed of, led the list of Circuits by a wide margin, with over 50 per cent more cases terminated than the next highest Circuit.

The cases docketed and disposed of by Circuits were as follows:

	Docketed	Terminated
Court of Appeals, District of Columbia	291	254
First Circuit	76	80
Second Circuit	425	450
Third Circuit	197	274
Fourth Circuit	108	110
Fifth Circuit	301	295
Sixth Circuit	236	231
Seventh Circuit	259	230
Eighth Circuit	271	226
Ninth Circuit	285	296
Tenth Circuit	178	175
Total	2,627	2,621

Petitions to the Supreme Court for review on certiorari to the Circuit Courts were considerably less in volume than last year, but the proportion of petitions granted to the number filed remained about one-fifth, varying from 17 per cent in private cases to 29 per cent in administrative appeals.

The median[3] time for the disposition of cases in the Circuit Courts which were disposed of after hearing or submission was reduced from 7.0 months in 1945 to 6.8 months in 1946. This period varied from 3.6 months in the Fourth Circuit to 9.3 months in the First Circuit. The medians for the various steps in disposing of cases in the Circuit Courts in 1946 were as follows:

	Months
From docketing to the filing of the last brief	3.9
From the filing of the last brief to the hearing or submission	0.4
From hearing or submission to the decision or final order	1.5

It will be noted from the last item that decisions have been made promptly, as in the past, and that the record of the Circuit Courts of Appeals in disposing of their cases has been excellent. Provisions for the assignment of Circuit Judges to sit in Circuits other than their own have been freely used, as appears from the Director's report, and have had their part in the results which have been attained. The median interval from filing the notice of appeal in the lower Court to the docketing in the appellate Court was 1.4 months, but this varies widely in the different Circuits by reason of local practices and Court Rules. For this reason, the period from judgment in the lower Court to decision in the appellate Court is also relevant, in determining the celerity with which appeals are disposed of in the Circuit Courts. In the three years during which those figures have been obtained by the Administrative Office, the median has uniformly been less than one year. In 1946, it was 10.8 months.

The total time from the docketing in the lower Court to decision in the appellate Court is of considerable interest to litigants, even though the time elapsed cannot be allocated to one Court. The median period for 1946 and 20.3 months, compared with a median of 21.8 months in 1945. Petitions for rehearing in half of all instances were disposed of in 15 days or less.

The report states that in the last year vacancies occurring in the office of judge were as a rule filled by The President with great promptness, and adds that this is a material help to the Courts in the dispatch of their work.

Legislation Beneficial to the Courts

Last year, according to the report, was a "red-letter" year in the enactment of legislation beneficial to the Courts. Foremost among such measures was the law raising the salaries of federal judges by the amount of $5,000 per annum. This went toward correcting a long-recognized inadequancy in their remuneration. The direct benefit to the judges, in relieving them of financial anxieties and enabling them to concentrate with less distraction upon their judicial duties, is important. The intangible benefits in the removal of the sense of injustice under which they have labored and the resulting improvement in their morale are also important.

The other measures most signifi-

2. Some miscellaneous cases not coming under either appeals from Courts or administrative appeals are not included, so that the sum of the two categories does not equal the total appeals.

3. This median is arrived at by arranging all the cases disposed of during the year after hearing or submission, in the order of time required for disposition. The median time is the time from the docketing to the disposition for the middle case of the series.

cant were a law putting the Referees in Bankruptcy on a salary basis instead of the fee system which has heretofore prevailed, and a series of measures improving the provision with reference to United States Commissioners, which had been enacted in 1896. The former was another step toward the complete elimination of the fee system as a method of compensating government officers, and it will insure to the Referees a moderate but dependable income instead of widely fluctuating earnings, sometimes excessive and sometimes, as in recent years on account of the small volume of bankruptcy business, almost lacking altogether. The cost of the bankruptcy system will continue to be defrayed, as heretofore, out of payments by the parties to bankruptcy proceedings. But the salaries and expenses of the Referees are guaranteed by the law and will be paid by the Treasury, which will be reimbursed, according to the plan, out of the charges in bankruptcy proceedings.

The bills concerning United States Commissioners will greatly simplify the method of their compensation, decrease the labor involved in the preparation and auditing of their accounts for services, procure greater promptness in their payment, and somewhat increase the amount of their earnings in keeping with the general increase in the compensation of government personnel in recent years. The report states that on account of the wide variety in the conditions in relation to the United States Commissioners now over 700 in number, no feasible plan has yet been found of putting them upon a salary basis; and the fee system, much simplified, is continued. The report states that the attainment ultimately of a salary plan remains as an objective and that impetus for it may come from the change in the system of Referees' compensation.

The Law for Official Court Reporters

Last year was the first year of operation of the law providing for Official Court Reporters appointed by the Courts in the United States District Courts. These Reporters receive salaries paid by the government, for their attendance upon the Courts, and are permitted to charge fees to litigants for transcripts furnished at fixed rates. The report states that the general opinion is that the new system is a definite improvement over the old policy of leaving the reporting of Court proceedings to

HENRY P. CHANDLER

private arrangements of the parties. It insures the presence in the Court at all times, without charge for his attendance, of a Reporter, like the Clerk. It insures a uniform rate for transcript for all litigants, the government as well as private citizens, and does away with discrimination in rates in favor of the government, which used to exist in many districts and which had to be made up by higher charges to private parties.

On the whole the report states that the cost of transcript to litigants under the new system is lower than the cost under the former policy of leaving the reporting to the parties. There are some complaints that particular salary and transcript rates are too low or unequal in relation to rates in other districts, and these were expected to be considered by the Judicial Conference.

The Federal Probation System

The federal probation system takes on increased importance on account of the new Federal Rule of Criminal Procedure requiring that presentence investigations and reports be made in all cases of convicted persons, unless otherwise directed by the Court, for the assistance of the judge in determining the sentence of the offender. This practice had already been established in many districts. The rule will, however, increase the use of it.

In addition, the federal probation officers are being called upon to give an increasing amount of time to the supervision of juvenile offenders, both on account of the increase in the number of such offenders and the recognition that close personal attention is one of the most important factors in their rehabilitation. These and other conditions have increased the burden which the probation officers are carrying. The report states that increase in the personnel of the system will be necessary in order to maintain the best quality of work and to avoid undue strain upon the present staffs. The report adds: "This will be conducive to economy, not in conflict with it, because probation is known to be by far the most inexpensive mode of treatment for offenders to whom it is adapted, and money spent here will bring dividends in costs of criminal prosecutions and imprisonment saved hereafter."

An important fact in relation to probation is the maintenance of the earning power of the probationers. According to the report 13,925 federal probationers reported earnings, during the last year, of $25,299,203.

Economy in the Administration of the Courts

The report expresses a purpose on the part of the Administrative Office of the United States Courts to exercise the utmost economy consistent with proper service. Continuing study is being made, in cooperation with the Courts, of ways of effecting savings in such matters as travel expense, equipment and supplies. A conspicuous reduction in cost which

has occurred is in the expense of juries, which has dropped from over $2,000,000 annually a few years ago to less than $1,400,000 in the last year. The saving is due to various causes, particularly the decrease in the proportion of jury trials and the increase in trials by the Court.

Pre-trial conference encouraged by the Federal Rules of Civil Procedure and promoted in various ways by the Judicial Conference of Senior Circuit Judges has been a factor in reducing the number of jury trials through settlements by the parties without trials and submission of cases to the Courts without a jury. But the report states also that definite care in planning on the part of Courts so as to adjust the number of jurors called to the number actually used, has played a part in the decrease in cost.

The budget of the federal courts for 1947, the current fiscal year, is less than one-twentieth of one per cent of the total federal budget. But the report recognizes that the amount involved, (approximately $16,000,000) is absolutely a large sum and that the courts should set a good example of administering it with care. The report asks the cooperation of the judges to this end.

Acknowledgment to the late Chief Justice Stone

Director Chandler's report concludes with the following acknowledgement of the service of the late Chief Justice Harlan Fiske Stone:

> He was always ready to consider problems in relation to the judicial administration, and his advice was direct and incisive. It went to the heart of the matter. He entertained the highest conceptions of public duty, and he set an example of single-minded and complete devotion of his own great powers to the country through the system of federal courts, of which he was the head. His spirit will always be an inspiration.

The Supreme Court Opens A Momentous Term

The October, 1946, term of the Supreme Court of the United States was opened on Monday, October 7, under circumstances which received more than usual attention and comment from lawyers and from members of the public generally.

There were several "firsts" about this occasion, as the *Associated Press* pointed out. It was the first public appearance of Chief Justice Frederick Moore Vinson of Kentucky in the Court. He ascended the bench, was presented by Mr. Justice Black of Alabama as the senior member of the Court, and thereafter took charge. He seemed suave, urbane, fully at ease.

It was also the first time in more than a year that the Court met with all of its members present. Mr. Justice Jackson of New York had been absent in Europe for more than a year. Since the collapse of Chief Justice Stone last April, during one of his many emphatic dissents, and his death soon afterwards, the Court has had only seven members present, less any who disqualified themselves in particular causes.

This was also the first meeting of the Court since Mr. Justice Jackson had hurled from Nuremberg his charges against Mr. Justice Black, which he characterized as "no personal vendetta".

Here they were, all nine members of the Court, taking up briefly the dispatch of its business as of old, then recessing for a week to consider the many petitions for certiorari, etc. Mr. Justice Jackson chatted pleasantly with Justices Douglas and Burton; Mr. Justice Black spoke briefly and only with Mr. Justice Frankfurter. With no decisions to be rendered, there seemed to be nothing to disturb amiability and the judicial mien.

As Mr. Justice Jackson took the chair from which he has so long been absent, lawyer-spectators wondered if he would find it easy to make the transition from his role of world prosecutor of German leaders for their crimes against humanity and the conscience of mankind, to the impartial and impersonal processes of a law-governed Court.

There was one event which contained elements of irony, although the faces of members of the Court did not reflect it. In announcing the death of the retired Mr. Justice McReynolds of Tennessee, with whom several members of the present Court had exchanged heavy blows because of his denunciation of majority opinions, Chief Justice Vinson paid tribute to him as "a vigorous, capable, determined and forthright member" of the Court, whose death "brought to a close a distinguished career and a life of devotion to duty".

The whole session took only twenty-one minutes.

Then the once-sacrosanct "robing room" was invaded by the press photographers—or was it? The newspapers carried photographs of the Chief Justice doffing his black habiliments, with the experienced aid of the attendant. Probably this homely portraiture would not have pleased the late Dean Walter B. Kennedy, nor Judge Jerome Frank (See "The Cult of The Robe", 32 A.B.A.J. 564).

Exceptions as to the Administrative Procedure Act

by Ashley Sellers

OF THE TEXAS AND GEORGIA BARS

There are three types of exceptions in the Administrative Procedure Act. First are exceptions to the Act itself. Second are exceptions to Sections. Third are various forms of exceptions to more detailed provisions.

Some misapprehension has been noted as to what the exceptions are and how they operate. What they are appears from any casual reading of the statute. How they operate requires more study in some instances.

It should be noted, preliminarily, that none of these exceptions operates beyond the requirements of the Administrative Procedure Act. Other requirements of law are not affected; the Act has been drawn to add requirements or to supplement requirements elsewhere made, but not to "diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law".[1]

Exceptions to Act

There are two general exceptions to the Act. They are, however, not so much exceptions—except in form—as they are parts of the definition of the term "agency". They are to be found in Section 2(a), which defines "agency" and which otherwise in pertinent part reads as follows:

> "Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. . . . . Except as to the requirements of Section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

The first sentence of Section 2(a) merely states the obvious: "Congress, the Courts, or the governments of the possessions, Territories, or the District of Columbia" are not Federal "administrative" agencies, and hence the "administrative procedure" requirements of the Act are not applicable to them.

It is to be observed that the exception set forth in the last sentence of Section 2(a) falls short of being a general one, because it expressly does not relieve the named functions from the requirements of Section 3 relating to public information.[2] The legislative history explains, what is apparent on the face of this provision, that it was intended to exclude representative agencies (because their make-up does not lend them to the procedures otherwise deemed necessary) and war or defense functions (because they are temporary in nature).[3]

Exceptions to Sections

There are five exception clauses applicable to whole sections of the Act. Since the sections of the statute relate to general subjects—such as public information, rule making, adjudication, miscellaneous matters, and judicial review—these exceptions are exceptions to subjects as well as to sections. They appear in the form of introductory clauses of the sections of the Act to which they relate. Only four of them are important.[4]

Public Information

From the public information requirements of Section 3 there is expressly excepted, "to the extent" that they are involved, "(1) any function of the United States requiring se-

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NOTE: This is the second of two articles prepared for the JOURNAL by Mr. Sellers. The first appeared in the October issue of the JOURNAL. 32 A.B.A.J. 646.

1. See Section 12.

2. See Section 3 and the other portions of Section 2(a).

3. It is not the function of this article to explain the reasons for each exception or type of exception made. The legislative documents contain authoritative explanations. They are available in consolidated form in Senate Document No. 248, 79th Congress, obtainable from the Superintendent of Documents, Washington, D. C. This document is distributed without charge to members of the Section of Administrative Law of the American Bar Association. In addition, Commerce Clearing House has issued, in its existing Federal Administrative Procedure Reporter, an elaborate analysis of the statute with full annotations to its legislative history.

4. The fifth is found in the brief introductory clause to Section 6, which makes the provisions of that section operative "except as otherwise provided in this Act". The legislative history explains that this exception was intended to prevent the right-of-appearance provisions of Section 6(a), for example, from superseding the separation of function provisions of Section 5(c). See Senate Judiciary Committee Report, No. 752, 79th Congress, page 18.

crecy in the public interest or (2) any matter relating solely to the internal management of an agency". This means that, in such cases and to the extent that the exception may be properly brought into play, agencies need not formulate and publish their rules of organization and procedure as otherwise required by Section 3(a), publish or make available to public inspection their opinions, orders, and rules as otherwise required by Section 3(b), or provide by rule for public access to official records as otherwise required by Section 3(c).

Rule-Making

From the rule-making requirements of Section 4 there is similarly excepted, "to the extent" that they may be involved, "(1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts". This means that, in the indicated situations, agencies need not publish general notice of proposed rule making as otherwise required by Section 4(a), afford the informal or formal procedures otherwise required by Section 4(b), defer the effective date of published rules as otherwise required by Section 4(c), or accord the right of petition otherwise mandatory under the terms of Section 4(d).

Adjudication

From the adjudication requirements of Section 5, applicable in any event only in cases "required by statute to be determined on the record after opportunity for an agency hearing", there are excepted, "to the extent" that they are involved:

> (1) Any matter subject to a subsequent trial of the law and the facts de novo in any Court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to Section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign-affairs functions; (5) cases in which an agency is acting as an agent for a Court; and (6) the certification of employee representatives.

These exceptions mean that, with respect to the kinds of matters listed, agencies are exempt from the notice and pleading otherwise required by Section 5(a), the settlement and formal procedures otherwise required by Section 5(b), the separation of functions otherwise required by Section 5(c), and the declaratory order provision of Section 5(d).

Judicial Review

The last of the important subject or section-wide exceptions are those relating to judicial review. From the Court review provisions of Section 10 there are exempted, "so far as" they may become involved, situations in which "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion". These exceptions mean that, in those situations and to the extent that the excepted subjects are involved, the Act is not applicable respecting the statutory right of review otherwise embodied in Section 10(a), the forms of review otherwise provided by Section 10(b), the specification of reviewable acts otherwise made in Section 10(c), the intermediate judicial relief provisions of Section 10(d), and the scope of review outlined in Section 10(e).

Subject Exceptions

It may be well to stress again that these subject or section exceptions, *supra*, are not exceptions to the Act as a whole, but merely to the subsections which they precede. Thus, for example, the exceptions to Section 3 relating to public information do not apply to any other section and those to Section 5 relating to adjudications do not apply to other sections or subjects.

Exceptions to Provisions

There are at least twenty-five exceptions to specific provisions of the statute.[5] They of course do not apply to the Act as a whole or to entire sections of it. They may be grouped and enumerated as follows:

Publication of Rules

Rules addressed to and served upon named parties are exempt from the publication requirements of Sections 3(a) and 4(a). Properly confidential opinions and orders need not be made available to public inspection under Section 3(b), nor need other official records of the same character under Section 3(c).

Rule Making

The exceptions in Section 4(a) make the notice and informal rule-making provisions of Sections 4(a) and 4(b) applicable only to substantive rules and not even then "in any situation in which the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Moreover, the procedures specified in Section 4(b) apply only to informal rule-making. The requirement of Section 4(c) that rules be published within a given period prior to their effective dates does not apply in emergency cases or to rules granting exemption, relieving restriction, interpreting statutes, or stating policy.

Formal Adjudications

In the field of adjudication, the settlement provisions of Section 5(b) apply only "where time, the nature of the proceeding, and the public interest permit". Under Section 5(c) hearing officers must make or recommend decisions unless they become unavailable to the agency, hearing officers are not to engage in ex parte discussions save to the extent required for the disposition of ex parte matters as authorized by law, and the subsection does not apply at all in certain licensing or utility proceedings or to the top agency itself or its members.

5. The word "except" is occasionally used in the statute not as introductory to a true exception but as a form of positive statement. Thus, under Section 6(b), investigations may not be undertaken "except as authorized by law". The same is true of the second sentence of Section 7(c) and of the fifth sentence of Section 12. On the other hand, the last sentence of Section 7(c) authorizing procedures for the submission of evidence in writing in certain types of cases is in effect an exception from the prior sentence conferring on every party the right to present his case or defense "by oral or documentary evidence".

Supplemental Procedures

The settlement or adjustment provisions of Section 6(a) apply only so far as the orderly conduct of public business permits; and the requirement that agencies proceed with dispatch is limited by the requirement that due regard be had for the convenience and necessity of the parties or their representatives. The right of a witness to have copies of evidence he submits may be limited, under Section 6(b), to inspection thereof in any non-public investigatory proceeding. The duty of agencies under Section 6(d) to state the grounds for denials of requests does not apply in affirming a prior denial or where the denial is self-explanatory.

Hearings and Decisions

In the matter of statutory hearings, the enumeration of the classes of officers who may preside under Section 7(a) does not supersede statutory provisions setting up other hearing officers in special classes of cases. The burden of proof provision of Section 7(c) does not supersede statutory provisions to the contrary. In the matter of agency decisions, the intermediate report requirements of the last sentence of Section 8(a) are modified in certain types of cases.

Other Provisions

The notice requirement in connection with license revocations under Section 9(b) does not apply in cases of willfulness or those in which public health, interest, or safety requires immediate action. The only "internal" exception to the judicial review provisions is that of Section 10(c) recognizing, for example, that other statutes may require applications for rehearings prior to resort to judicial review. The provision of Section 12 requiring equality of requirements or privileges as to evidence or procedure does not apply if there is some other provision of law to the contrary in a specific matter. Section 12 contains at least one further exception in that the procedural requirements of the Act are not "mandatory" with respect to agency proceedings commenced prior to the respective effective dates of such requirements.

Conclusion

Many things may be said about the several types of exceptions to the Administrative Procedure Act. Some should be mentioned here. Each class of exceptions—those to the Act itself, those to sections, and those to particular provisions—operates differently. Even then they are not as broad as they may seem at first glance. For example, although Section 2(a) makes certain exclusions "from the operation of this Act", that is not true "as to the requirements of Section 3". Hence it would seem clear that Section 10, respecting judicial review, may be invoked to enforce the requirements of Section 3.

Again, the introductory-clause exceptions to Sections 4 and 5 respecting rule-making and adjudication—the two principal forms of administrative action—relate only to the sections to which they are attached, so that the excepted matters would still be subject to Sections 6, 9, 10, and 12 relating to proceedings, powers, review, and construction. Similarly, while there are six numbered exceptions to Section 5 on adjudication, the six subjects are nevertheless subject to Sections 6, 9, 10, and 12.

The more numerous special exceptions to detailed provisions follow a consistent pattern. They are based upon well-recognized differences in subjects or operations.

The several types of exceptions, and the particular exceptions stated in the Act, merit a special effort by the Bar to understand its operation. Such understanding will be necessary if lawyers are to have the full benefit of the Act in preserving and protecting the rights of the parties they represent. Since the Act deals largely with procedure, judicial as well as administrative, lawyers will find themselves at home with it, once the ice is broken by study of its terms, structure, and exceptions.

"Holmes and Brandeis Dissenting"

"The greatest phase of Brandeis' long career was his tenure of twenty-three years as Supreme Court Justice, as half of the famous team of Holmes and Brandeis dissenting. In a provocative chapter, Professor Mason demolishes somewhat the vaunted liberalism of Holmes. He sees him as an enlightened skeptic, committed to no basic social philosophy. Furthermore, an inherent impatience with visionary social reform drove him into a position of detachment. Holmes' thinking in the field of economics was immature. He had only an imperfect grasp of the significance of the economic forces of his day—his opinions do not have the sense of urgency nor the drive of the militant social crusader that stamp the Brandeis' dissents.

On the Bench—whether writing for the majority or in brilliant dissent—Brandeis was a great liberal in the true sense, because he saw law as an instrument of social policy, because he insisted that the various organs of government be kept within the bounds assigned to them by the Constitution. He was as opposed to using or promoting the use of other peoples' powers as he was to the unauthorized use of other peoples' money. Few men have been privileged, as was Brandeis, to live to see their prophetic judgments enacted time and again as the law of the nation. It was with wisdom that Franklin D. Roosevelt addressed him, affectionately, as 'Isaiah.'"

—From Harvey J. Bressler's review of Professor Alpheus T. Mason's "Brandeis: A Free Man's Life", in the New York *Times* Book Review for September 22.

Labor Disputes: Their Settlement by Judicial Process

by Eugene C. Gerhart

OF THE BINGHAMTON, NEW YORK, BAR

Where there is no law, there is no freedom.
John Locke

This winning essay in the 1946 competition for the annual prize established under the will of Judge Erskine M. Ross, of California, is recognized as an unusually thoughtful and constructive contribution to the public discussion of its vital topic. The winner is the 34-year-old member of the Association and its Junior Bar Conference, who had already contributed to the JOURNAL *an account of his preparations and his experience in opening his own law office in a small but thriving city in upstate New York: "Going It Alone", 32 A.B.A.J. 397. Mr. Gerhart received the $3,000 prize and the Association's certificate of award, at the Atlantic City meeting on October 31. He also participated in the organization meetings of the Association's new Section of Labor Relations Law.*

I. "This National Disaster"

On May 4, 1905, a Boston lawyer, speaking on "The Opportunity in the Law," said:

> Here, consequently, is the great opportunity in the law. The next generation must witness a continuing and ever-increasing contest between those who have and those who have not. The industrial world is in a state of ferment.[1]

His name—Louis Dembitz Brandeis. The succeeding generation has witnessed that contest. Statements today by leaders of labor[2] and management[3] fulfill the Brandeis prophecy.

Viewing the strike situation following the close of World War II, no reasonable observer could deny that the United States is facing a crisis. The soft coal strike in April and May, 1946, reached proportions which led President Truman to issue a White House statement describing the strike as "this national disaster."[4]

Anxiety is felt throughout the nation. Labor unions are wielding tremendous power. Just as after the decision in *Dartmouth College* v. *Woodward*[5], it is felt that danger threatens the public welfare when a thing created by law is placed beyond the control of the law.[6] Truly, today, "the industrial world is in a state of ferment." From the beginning of the Common Law men's lives, liberty, and property have been controlled by law and the judicial process. How can labor disputes be settled by the judicial process?

II. The Nature of the Judicial Process

No finer analysis of the nature of the judicial process exists than that by Mr. Justice Cardozo:

> My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law.[7]

What do we learn from logic and history, from custom and utility of the settlement of industrial disputes? What are the "standards of right conduct" in labor disputes? What conclusions can we draw from these elements which will "shape the progress of the law" of industrial relations?

Adapting Blackstone's principle

1. Brandeis, *Business—A Profession* (Boston: Hale, Cushman & Flint, 1933), page 342.

2. "Take away my liberty and I will fight you. I care not who you are. Attempt it at your peril. I say that for myself and I say it for American labor here, because I think I know something about how American labor feels in this country, . . ." John L. Lewis, President of the U. M. W. A., statement to the House Labor Committee on December 10, 1945, as quoted in the United Mine Workers Journal, Vol. LVI, No. 24 (December 15, 1945), page 16.

3. Chairman Ira Mosher of the National Association of Manufacturers on May 18, 1946, outlined a seven-point labor policy. Point No. 1 was: "Make collective bargaining agreements equally binding on labor unions and management alike." He said, "Industry firmly believes in the right to collective bargaining, but industry is convinced that such bargaining must be fair to all—not one-sided, as it is at present." New York *Times*, May 19, 1946, page 5, col. 6.

4. N. Y. *Times*, May 5, 1946, Sec. I, page 1, col. 1. Editorial, "'This National Disaster'," *Id.* May 6, 1946, page 20, col. 1; *Rise of Labor Unions' Power: Ability to Paralyze the Nation*, XX United States News, May 24, 1946, page 13. *Work Stoppages Caused by Labor-Management Disputes in 1945*, Monthly Labor Review, Vol. 62, No. 5 (May, 1946), pages 718 and 723; *Work Stoppages in March 1946, id. at page 764.* And see President Truman's addresses to Congress and the nation in 92 Cong. Rec. May 25, 1946, at 5793 and 5861.

5. 4 Wheat. 518 (1819).

6. N. Y. Gen. Corp. Law §5, page 17, note.

of statutory construction[8] to our problem, we shall examine industrial relations:

1. At Common Law.
2. Under the Wagner Act, showing its deficiencies.
3. The principles of law applicable to labor disputes.
4. The remedy.

Our discussion will dwell primarily on federal law. The same analysis is adaptable to State law.

What was the situation prior to 1935?

III. Business and Labor under Common Law

Disputes between capital and labor have existed since the beginning of our Common Law, as have statutes regulating them.[9] The same problem troubled the framers of our Constitution.[10] Labor disputes have been adjudicated by the judicial process over the course of centuries by our legal system. Many businessmen can recall the judicial emphasis on property rights embodied in the language of Malins, V. C., in *Springhead Spinning Co*, v. *Riley*.[11] This emphasis on property rights in England found its counterpart in the decisions of the United States Supreme Court at the turn of this century.

In 1908 the Supreme Court held that Congress could not prevent an interstate railroad from discriminating against employees who belonged to a union.[12] To do so would violate the carrier's rights of liberty and property protected by the Fifth Amendment. The Fourteenth Amendment received a similar interpretation.[13] State statutes which prohibited State courts from enjoining disorderly picketing were declared unconstitutional because of the property right an employer had in his business.[14] In 1923 the Supreme Court held that Congress could not fix minimum wages.[15] Mr. Justice Brandeis was a frequent dissenter in cases of this class, for it was his social philosophy that human rights transcend property rights when the two conflict.[16] His remedy was to educate our judges.[17]

At Common Law neither the rights of labor nor of capital were the paramount rights which the law protected.[18] Under a true interpretation of the Common Law, all business was public, and one engaged in business, either as owner or as worker, was engaged in a public profession and in a public calling.[19] The idea that "public utilities" are the only businesses affected with a public interest was not the view of the Common Law.[20] The community interest was paramount, and both labor and capital were subordinate to it.[21] Surely, the community has the right to insist on law and order in all business, industrial or otherwise; but it is vanity to expect order and in the same breath deny law.

What were the Common Law standards to be applied to labor relations? A "Magna Carta" of fair labor standards, proclaimed by lawyer Louis D. Brandeis in 1904[22], embodies his principles to govern the

7. Cardozo, *The Nature of the Judicial Process*, (New Haven: Yale University Press, 1921), page 112. "'Judicial process' in the broadest significance of the expression, comprehends all of the acts of the court, from the beginning of the proceeding to its end. In a narrower sense, it is the means of compelling a defendant to appear in court, after the suing out of the original writ, in civil, and after indictment, in criminal, cases. Any writ is process, the two terms being interchangeable." 42 Am. Jur. 5. And see 23 *Words and Phrases* (Perm. ed.) 328.

Due process has a more restricted meaning. "In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the *Dartmouth College* case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society."' Cooley's Const. Lim. 353." Ex Parte Wall, 107 U. S. 265 (1882) at page 289.

8. "1. There are three points to be considered in the construction of all remedial statutes: the old law, the mischief, and the remedy, that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy." 1 Bl. Comm.* 87.

9. One of the earliest statutes regulating labor and wages was the Statute of Laborers, enacted after the plague of 1348, 23 Ed. III (1349) and 25 Ed. III, St. 2. The plague resulted in strife between capital and labor. "'Every man or woman,' runs the famous provision, 'of whatsoever condition, free or bond, able in body, and within the age of threescore years, . . . and not having of his own whereof he may live, nor land of his own about the tillage of which he may occupy himself, and not serving any other, shall be bound to serve the employer who shall require him to do so, and shall take only the wages which were accustomed to be taken in the neighborhood where he is bound to serve' two years before the plague began. A refusal to obey was punished by imprisonment." Green, *A Short History of the English People*, (World's Great Classics Ser., New York: The Colonial Press, 1900), Vol. I, pages 306-7. See Mr. Justice Brandeis dissenting in *Truax* v. *Corrigan*, 257 U. S. 312, at pages 357-60, 366. Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135 at 147.

10. James Madison, The Federalist, No. 10, *The Numerous Advantages of the Union* (World's Great Classics Ser., New York: The Colonial Press, 1901), page 46.

11. ". . . if it should turn out that this Court has jurisdiction to prevent these misguided and misled workmen from committing these acts of intimidation, which go to the destruction of that property which is the source of their own support and comfort in life, I can only say that it will be one of the most beneficial jurisdictions that this Court has ever exercised." L. R. 6 Eq. 551 (1868). A survey of the British law is found in Sells, *The Settlement of Industrial Disputes in Great Britain*, V Law and Contemp. Prob. (Spring, 1938), page 321.

12. *Adair* v. *United States*, 208 U. S. 161 (1908).

13. *Coppage* v. *Kansas*, 236 U. S. 1 (1915).

14. *Truax* v. *Corrigan*, 257 U. S. 312 (1921).

15. *Adkins* v. *Children's Hospital*, 261 U. S. 525 (1923).

16. Brandeis, *op. cit. supra*, note 1, pages lii-liv, and 338-39. See Mason, *Brandeis: Lawyer and Judge in the Modern State* (Princeton: University Press, 1933), *passim*.

17. Brandeis, *op. cit.*, page liv.

18. Adler, *Labor, Capital and Business at Common Law* (1916) 29 Harv. L. Rev. 241; *Business Jurisprudence*, 28 *id.* 135.

19. Adler, *supra*, note 18, 28 Harv. L. Rev. at 158; 29 *id.* at 245.

20. "All business is public, regardless of the disguise under which the function is performed and is subject in consequence to rights and obligations with respect to the community. And from this it must follow that the factors or constituent parts of business stand in the same public relation." Adler, *loc. cit.*, 29 Harv. L. Rev. at 246 and 249.

21. Adler, *loc cit.* 29 Harv. L. Rev. at 246 and 249. At page 251 he states: "At common law, then, labor and capital, no less than business, are public." For an interesting account of the growth of trade unionism during this period, see *Modern Trade Unionism*, by William Green, A. F. of L. President (Washington, D. C.: A. F. of L., 1925).

relations of employer and employee in all branches of industry:

"First. Prolonged peace and prosperity can rest only upon the foundation of industrial liberty."[23]

"Second. The right of labor to organize is recognized by law, and should be fully recognized by employers."[24]

"Third. Employees are entitled to be represented by union officers. . . .

"Fourth. Employers and employees should try to agree. . . .

"Fifth. It is necessary that the owners or the real managers of the business should themselves participate in the conferences, partly because the labor problem requires the best thought available and the most delicate treatment, and partly because employees feel better satisfied and are apt to receive better treatment when they are dealing with the ultimate authority and not with an intermediary."[25]

"Sixth. Lawless or arbitrary claims of organized labor should be resisted at whatever cost. I have said that it is essential in dealing with these problems that the employer should strive only for the right. It is equally important that he should suffer no wrong to be done unto him. . . . *Industrial liberty, like civil liberty, must rest upon the solid foundation of law."*[26] (Italics supplied)

He felt that these standards for industrial relations would endure.[27]

Here is our Common Law heritage. The law today has not attained the sixth principle. Before 1935, it had gone but a short way toward realization of the other five. The inequality of bargaining power between the workman and large aggregates of capital, as well as the financial depression after 1929, with its widespread unemployment, led to the adoption of the so-called "Wagner Act," the National Labor Relations Act.[28] So—what of the "remedy the parliament hath provided to cure this mischief"?

IV. The Wagner Act and Its Deficiencies

Briefly stated, the Act's purpose is to:

1. Protect labor's right to unionize.
2. Protect labor's right to collective bargaining by establishing equality of bargaining power.[29]
3. Protect employees and unions against certain unfair labor practices on the part of employers.

It is to be noted that the Act does *not* purport to be—nor is it—a comprehensive code of fair labor standards. It was passed by Congress for the purposes set forth. Few will dispute that, as enforced by the National Labor Relations Board, the above purposes have been accomplished. The Act was held constitutional by the Supreme Court in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937).

Since the enactment of this statute, there has been a clamor from various quarters for its amendment.[30] Proposed amendments have been vehemently fought by labor leaders,[31] and in some government quarters as well.[32] These attitudes have been reflected in the litigation involving the Act. The period of World War II was one of active litigation in the labor field. Between the October term, 1941, and the same term in 1944, the United States Supreme Court decided forty-four cases

22. "The Employer and Trade Unions"; reprinted in *Business—A Profession*, pages 13-27.

23. *Id.* page 16. He adds: "Industrial democracy should ultimately attend political democracy. Industrial absolutism is not merely impossible in this country at the present time, but it is most undesirable. We must avoid industrial despotism, even though it be benevolent despotism. Our employers can no more afford to be absolute masters of their employees than they can afford to submit to the mastery of their employees, than the individual employees can afford to have their own abilities or aspirations hampered by the limitations of their fellows." *Id.* pages 16-17.

24. *Id.* page 18. "We believe in democracy despite the excesses of the French Revolution. . . . We must not forget the merits of unionism in our righteous indignation against certain abuses of particular unionists." Pages 18-19.

25. *Id.* pages 20-23.

26. *Id.* pages 24-26. "Disregard the law in either, however good your motives, and you have anarchy. The plea of trade unions for immunity, be it from injunction or from liability for damages, is as fallacious as the plea of the lynchers. If lawless methods are pursued by trade unions, whether it be by violence, by intimidation, or by the more peaceful infringement of legal rights, that lawlessness must be put down at once and at any cost."

"Likewise industrial liberty must rest upon reasonableness. We gain nothing by exchanging the tyranny of capital for the tyranny of labor. Arbitrary demands must be met by determined refusals, also at any cost." *Id.* pages 26-27. See *Thomas* v. *Collins*, 323 U. S. 516 (1944), at 532.

27. "These are principles by which alone the labor problem can be satisfactorily solved. They are broad, indeed; for they are the eternal principles of LIBERTY, FRATERNITY, JUSTICE, HONOR." *Id.* page 27.

28. 49 Stat. 449, 29 U. S. C. 151, approved July 5, 1935. In addition to the Wagner Act, the following are some of the other important federal statutes which affect labor relations: The Sherman Act, 26 Stat. 209, 15 U. S. C. 1 (1890); The Clayton Act, 38 Stat. 730, 738, 29 U. S. C. 52 (1914); Railway Labor Act, 44 Stat., Pt. 2, 577 (1926), as amended, 48 Stat. 1185 (1934), 45 U. S. C. 151; Norris-La Guardia Act, 47 Stat. 70, 29 U. S. C. 101 (1932); Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. 201 (1938); War Labor Disputes Act, 57 Stat. 163, 50 U. S. C. 1507 (1943). The War Labor Board was established by Executive Order No. 9017, 7 Fed. Reg. 237, CFR, Cumm. Supp., Tit. 3, c. II, page 1075.

29. The desirability of equality of bargaining power between employer and employee has been recognized for some time. See, for example, Brandeis, *op. cit. supra*, note 1, at pages 16-17; Holmes, J. dissenting in *Coppage* v. *Kansas*, 236 U. S. 1, 26-27. In *The Nature of the Judicial Process*, Mr. Justice Cardozo, at page 82 quotes Charmont's *La Renaissance du droit naturel* (Montpellier, Coulet et fils, éditeur, 1910), page 172, as follows: "On tend à considerer qu'il n'y a pas de contrat respectable si les parties n'ont pas été placées dans les conditions non seulement de liberté, mais d'égalité. Si l'un des contractants est sans abri, sans ressources, condamné à subir les exigences de l'autre, la liberté de fait est supprimée."

30. See, for example, Gall and Smethurst, *Amending the Wagner Act: The Problem from the Manufacturer's Viewpoint*, (1938) V Law and Contemp. Prob. 306; Cooper, *What Changes in Federal Legislation and Administration Are Desirable in the Field of Labor Relations Law*, (1942) 28 A.B.A.J. 385. The United States Chamber of Commerce advocated amendments at its 1946 convention in Atlantic City in May, 1946. New York *Times*, May 3, 1946, page 12.

31. *The Administration and Politicians are on an All Out Anti-Labor Spree*, United Mine Workers Journal, Vol. LVI, No. 24 (December 15, 1945), page 10; *Fight Certain Over Fact-Findings Bill as Approved by House Labor Committee*, United Mine Workers Journal, Vol. LVII, No. 3 (February 1, 1946), page 11; *B-B-H—An Evil Bill*, pamphlet published by Congress of Industrial Organizations.

involving labor law. Twenty-one of these cases arose under the Wagner Act.[33]

The advantages which labor, collectively, has gained have not been attained without limitations on the individual working-man's liberty of contract.[34] Therefore, the law must be vigilant to protect the individual employee's minority rights against discrimination by the union majority.[35] The Supreme Court, while enlarging the right to picket, has refused to extend constitutional protection to "continuing representations unquestionably false."[36] Labor leaders have been extended greater privileges of freedom of speech than the Court has accorded employers.[37] In *United States* v. *Local 807*, 315 U. S. 521 (1942), the Supreme Court held federal law did not prohibit threats, assaults, or violence by a union to compel employers to make stand-by payments to union members. Such apparently inconsistent partiality could not but offend businessmen and lawyers "of the old school."[38]

That a new era of labor-management relations has been born is no longer open to question. Now it is labor unions who fight regulation by law on the ground that regulation will deprive *them* of liberty.[39] Our judges have been educated to a new attitude. Between 1941-1945 the Supreme Court sustained the position of the NLRB in seventeen out of the twenty-one cases in which the Board was involved before the Court.[40] It can scarcely be denied that during the last decade the Federal Government has been pro-labor and pro-union.[41] The Supreme Court has been accused of similar predilections.[42] The Court has come a long way since the *Debs* decision.[43]

"Law must be stable, and yet it cannot stand still."[44] Present federal labor law is deficient[45] in the following respects:

1. *It does not provide* for the protection of the public interest in labor disputes in cases involving:
   a. Public utilities
   b. Business enterprises so large or so economically important that their stoppage can

32. J. Warren Madden, while Chairman of the NLRB, made the following statements at the annual convention of the A. F. of L. in Denver, October 5, 1937: "To equalize the law would require that the police inquire who caused this strife, and if they conclude that the employer caused it, they should back the police wagon up to his office and push him in, lock him up in a dirty jail and charge him with vagrancy or being a suspicious person, set his bail so high he could not meet it, and leave him. Do those who prate of equality really want equality?" *In Opposition to "Equalizing" Amendments to the Wagner Act*, (1938) V Law and Contemp. Prob. 318, at 319.

33. Dodd, *The Supreme Court and Organized Labor* (1945) 58 Harv. L. Rev. 1018, 1019.

34. "The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. . . . The workman is free, if he values his own position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result." Mr. Justice Jackson in *J. I. Case Co.* v. *NLRB*, 321 U. S. 332 (1944), at 338-39.

35. Dodd, *supra* note 33, at 1039.

36. "In a setting like the present, continuing representations unquestionably false and acts of coercion going beyond the mere influence exerted by the fact of picketing, are of course not constitutional prerogatives. . . . Still less can the right to picket itself be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing." *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293 (1943), at 295-96.

37. *Thomas* v. *Collins*, 323 U. S. 516 (1945), particularly Mr. Justice Jackson's concurring opinion at page 548.

38. "Labor unions have in recent years succeeded, to an extent that would have astonished lawyers of an earlier generation in using the Fourteenth Amendment as a shield against state limitations on union picketing and union proselytizing. Liberty, as established by that amendment includes a very broad right of free speech, even though the speech be union persuasion not to deal, which, if successful, will be destructive of commercial good will." Dodd, *supra* note 33, at 1060.

39. John L. Lewis in his appearance before the House Labor Committee on December 10, 1945, is quoted in Vol. LVI, No. 24, of the UMW Journal for December 15, 1945 at page 4, as follows:

"*Cong. Barden.* Then if I get your statement correctly, you wouldn't advocate any machinery or any legislation or any action on the part of Congress, and wouldn't look with favor upon a decision that would make a contract by a labor union with an employer enforceable or would make a contract between an employer and a union enforceable from the other end.

"*Pres. Lewis.* That is just so right I cannot add anything to it. And I want to say this — one of the reasons I wouldn't is that such legislation would destroy every existing labor organization in this country. . . . Now is that what you want so that you can hire a Pinkerton detective and send him to my local union and raise hell up there and defame labor. I am against it!"

40. Dodd, *loc. cit. supra* note 33, at 1066-67.

41. Dodd, *loc. cit. supra* note 33, at 1071; editorial, "'This National Disaster'," New York *Times*, May 6, 1946, page 20, col. 1; editorial, "Washington Paralysis," *id.* May 9, 1946, page 20, col. 1; editorial, "Are Strikes Good?" *id.* May 10, 1946, page 18, col. 1. For a scientific, impartial review of the labor policy of the national government, see Metz, *Labor Policy of the Federal Government*, (Washington, D. C.: The Brookings Institution, 1945), especially Chap. IX, pages 229-54. "Some members of the NLRB have at times believed it more desirable for workers to strike than to use the Board for enforcing rights guaranteed to them by the act. Thus Edwin Smith assisted the Textile Organizing Committee in carrying out a strike by stimulating a boycott against certain manufacturers. And various employees of the Board in 1937 attempted to bring about strikes in the steel industry." Metz, *op. cit.*, page 230.

42. Mr. Justice Jackson dissenting in *Jewell Ridge Coal Corp.* v. *Local No. 6167*, UMWA, 325 U. S. 161, 170 (1945); *id.* at 897. Editorial, "The Double Standard," New York *Times*, June 14, 1946, page 20, col. 3.

"But I must admit that in overriding the findings of the Texas court we are applying to Thomas (then President, UAW-CIO) a rule the benefit of which in all its breadth and vigor this Court denies to employers in National Labor Relations Board cases." Mr. Justice Jackson concurring in *Thomas* v. *Collins*, 323 U. S. 516 (1945), at 548. "Within the past eight years the Supreme Court has become much more sympathetic toward labor than it ever had been before." Metz, *op. cit. supra* note 41, page 21, "Without this general change of attitude on the part of the Supreme Court, the present labor policy of the federal government would not be possible in a constitutional sense." *Id.* at page 24. See Dodd, *loc. cit. supra*, note 33 at page 1071, and Mr. Justice Roberts' dissenting opinion in *Allen Bradley Co.* v. *Local Union No. 3*, IBEW, 325 U. S. 797 (1945), 813 *seq.*

43. *In re Debs*, 158 U. S. 564 (1895). The Court said: "But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation, to compel obedience to its laws." (At page 582).

44. Cardozo, *The Growth of the Law* (New Haven: Yale University Press, 1931), pages 2 and 143, quoting Pound, *Interpretations of Legal History*, page 1.

45. An able discussion of this entire topic will be found in 28 A.B.A.J. 385 (June, 1942) by Frank E. Cooper, entitled, *What Changes in Federal Legislation and Administration Are Desirable in the Field of Labor Relations Law.* See also the dissenting opinion of Mr. Justice Frankfurter in *Hill* v. *Florida*, 325 U. S. 538, at 558-61.

disastrously affect the public interest; *e.g.*, the soft coal strike of 1946.[46]

c. Monopolistic practices of unions in restraint of trade.

2. *It does not provide* that employees must bargain in good faith.
3. *It does not provide* any procedure whereby a grievance arising during the period of the contract must be settled without resort to a strike.
4. *It does not provide* any definition of, nor remedy for unfair labor practices on the part of unions or employees.
5. *It does not provide* any procedure by which an employer can enforce the terms of the contract resulting from collective bargaining.
6. *It does not provide* any standards of conduct nor remedies for disputes arising between unions, union officers, and union members, *inter sese.*
7. *It does not provide* any effective method by which unions are held responsible legally or financially for their acts either to the Federal Government or to parties with whom they collectively bargain.[47]

Thus stands the law! So it is natural that management's representatives should propose changes and ask for equality[48] and that labor leaders should strenuously oppose legislation imposing responsibilities.[49] What does the public think of this situation?

If the Gallup Poll accurately reflects American public opinion, then it is permissible to draw the following conclusions:

1. Union members, but not their leaders, favor a "cooling-off" period and fact-finding boards in labor disputes.[50]
2. The great majority of voters favor President Truman's "cooling-off" plan for management-labor disputes.[51]
3. The American people think Congress should take action on the strike situation.[52]
4. The American public would give overwhelming support to a law designed to forbid all strikes in public service industries.[53]

If this is American sentiment on these questions, then the lawyer's role and the task of the Bar Associations are to present to the Nation a fair code of laws for the settlement of labor disputes.[54] What are the legal principles which should form the basis of a code for the settlement of labor disputes by the judicial process?

V. Legal Principles Applicable to Industrial Relations

The trend in labor-management relations led in 1935 to the passage of the Wagner Act. Just as the control of great economic power in the hands of capital required regulation by law, so the similar concentration of

(Continued on page 801)

46. See "Are Strikes Good?" editorial, New York *Times*, May 10, 1946, page 18, col. 1. See also the text of Civilian Production Administration's second report on the impact of the coal strike on reconversion. *Id.* at page 2, col. 3. The same paper carries a Reuter's dispatch from London, dated May 9, the first sentence of which reads: "The United States coal strike is rapidly becoming an economic crisis for the world." *Id.* col. 4.

47. Dodd, *loc. cit. supra*, note 33, at page 1051, discussing *Allen Bradley Co.* v. *Local Union No. 3*, IBEW, 325 U. S. 797 (1945).

48. Address by Robert W. Wason, President of the National Association of Manufacturers, in Detroit, March 11, 1946, entitled, "Can We Produce and Prosper under Government by Concession?" A resolution, "Industrial Relations in America — A Program," was adopted by the Chamber of Commerce of the United States on May 2, 1946. This resolution states, at page 6, "It is a fundamental principle that there should be equality before the law. That principle is not recognized in the National Labor Relations Act, the avowed purpose of which was to diminish the causes of labor disputes. The law should be revised to bring about equality of rights as to employers and employees."

49. See *Congress Should Not Weaken Labor to the Advantage of Rich and Powerful — Lewis*, being the text of John L. Lewis' statement to the House Labor Committee in opposition to the enactment of the Truman proposed fact-finding bill. It is reprinted in the United Mine Workers Journal, Vol. LVI, No. 24 (December 15, 1945), page 14. Philip Murray's Letter to President Truman Calling on Him to Disapprove the Case Measure, New York *Times*, June 3, 1946, page 10, col. 1. *Cf.* "No Help from Mr. Murray," editorial, New York *Times*, June 4, 1946, page 22, col. 3.

50. American Institute of Public Opinion, Princeton, New Jersey, Public Opinion News Service Release for January 4, 1946. "In measuring the sentiment on the issue, the Institute had field reporters ask: 'President Truman has proposed a law requiring a 30-day cooling-off period before a major strike could start. During this time a committee would look into the facts and causes of the dispute and make public its report. Would you favor or oppose such a law?'" The vote of *union members* was as follows:

"Favor	70%
Oppose	16%
Undecided	14%"

Union members felt such a measure would reduce strikes. The vote of the union members in reply to the question, "Do you think this law would operate to reduce strikes?" was:

"Yes	68%
No.	21%
Undecided	11%"

51. Public Opinion News Service Release for January 5, 1946.

52. Public Opinion News Service Release for February 18, 1946.

53. The nation was polled with this question, "Should laws be passed to forbid all strikes in public service industries such as electric, gas, telephone, and local transportation companies?" The replies included:

"Entire Nation	
Approve law to forbid utility strikes	60%
Disapprove	32%
Undecided	8%"

"Union Members	April 17, '46	May 31, '46
Approve law to forbid utility strikes	40%	49%
Disapprove	52%	44%
Undecided	8%	7%"

54. The American Bar Association is already actively making progress toward this goal. See *The Association's Recommendations as to Labor Legislation*, (1942) 28 A.B.A.J. 172; *The Supremacy of Law*, by David A. Simmons, President of the American Bar Association, 1944-45, (1946) 32 A.B.A.J. 17, especially at pages 19-21. Also *Report of the Standing Committee on Labor, Employment and Social Security*, (1944) 69 A.B.A. Rep. 254. The Association's Committee on Labor, Employment and Social Security on September 28, 1945 recommended the creation of a section on Labor Law. The Association has authorized the creation of this section. At the 1945 sessions of the Assembly of the American Bar Association, held in Cincinnati, Ohio, on December 16-20, 1945, a resolution was adopted reading in part as follows:

> "THEREFORE, BE IT RESOLVED, by the American Bar Association, that rules and standards of conduct and action be set by law for the benefit and guidance of labor and industry and the protection of the public interest, and further, that the interpretation of rights under such rules and standards be determined and adjudicated through the judicial process." (1946) 32 A.B.A.J. 172.

It would appear highly desirable, in view of the present confusion in state labor laws, for the Commissioners on Uniform State Laws to draft a Uniform Fair Labor Standards Act. See Metz, *op. cit. supra* note 41, page 83.

"Books for Lawyers"

STANDARD ANNOTATED REAL ESTATE FORMS. *By Saul Gordon. New York: Prentice-Hall, Inc. 1946. $12.60. Pages ix, 1343.*

Essentially well-done and worthwhile, this volume could have been improved. Mr. Gordon's most incisive editing has produced the best forms. Although he has usually avoided such examples as a jurat[1] of some 600 words[2], he follows entrenched patterns of draftsmanship, makes no point of style, and ignores recent advocates of streamlined documents.[3]

Most forms seem overly complete. Headings, recitals, formalities, similar or identical provisions appear in mimeographic repetition. Query whether completeness of each form warrants resulting unwieldiness and expense.

Valuable material buried in the interior of the forms[4] is inadequately indexed.[5] The index to whole forms is complete (102 pages) and better than most. A "key-word" system[6] engrafted onto the present arrangement would make it still more usable, and would more easily pin-point specific items.

The annotations, excellent on some subjects, are generally good. Almost always, disproportionate emphasis is accorded to New York; and on occasion, a fundamental is overlooked,[7] a citation is unreliable,[8] or seems dated.[9] Numerous expositions as to what the law ought to be[10] might better be left to texts. Parallel citations to cyclopedic treatments and modern secondary authorities are noticeably missing.[11] Elaborate marshalling of precedents to support statements of elementary principles add no intrinsic merit. For jurisdictions outside New York, pertinent references to statutes or leading cases are sometimes missing,[12] even where a summary of the viewpoints is given or the States are named.

As a further independent suggestion, could not relevant essentials be collated into a more exhaustive check-list,[13] after the practice of some other professions?

This critical examination should not obscure the primary observation: *Standard Annotated Real Estate Forms* is a useful tool to a practising lawyer. Its faults point up *inter alia* that: (a) There can be no substitute for competent legal counsel[14]; (b) For counsel to be competent, there is no substitute for conscientious application and critical evaluation[15]; (c) New situations require non-standard provisions[16] and (d) Rhetoric and semantics are essential tools in legal draftsmanship.

RICHARD T. BOEHM

Columbus, Ohio

ALEXANDER H. STEPHENS. *By Rudolph Von Abele. New York: Alfred A. Knopf. 1946. $4.00. Pages 337.*

The last time I came in from the Cape, it was twilight when the Provincetown boat turned into Boston harbor. My thoughts were on the present—on the waving G. I.s who lined the rails of the two transports to which the tugs were shrieking a welcome—on the boy who had flown in that day from overseas and was waiting for us down in Washington. Then on the port side came Fort Warren, and my mind turned to the end of another war. It was not difficult to imagine that a prisoner—the gaunt, pale, pathetic figure of the American lawyer who was the Vice President of the Confederacy—was pacing the parapet. Although I knew little about him, his imprisonment had for me, as for many others, dramatized Alexander H. Stephens.

The memory of that August afternoon lingered, for I became interested in Stephens. First I turned to Gamaliel Bradford and found that he had called Stephens "if not the greatest, certainly the most curious and interesting figure in the lightning-lit panorama of Confederate history". Indeed, Bradford's ideal-

1. Form 537, (page 1221), concerning separate examination of a wife.
2. Cf. Walter P. Armstrong's review of *The Art of Plain Talk*, 32 A.B.A.J. 472 (August, 1946).
3. Cf. Editorial on use of "said", 32 A.B.A.J. 344 (June, 1946).
4. Cf. Forms 375, (page 721), and 373 (page 687), of 25 and 20 pages, respectively. No attempt has been made to index interior material, and the short explanatory captions are too general to accomplish much in this direction. There are dozens of similar examples, not so spectacularly long.
5. For an example of piecemeal indexing of interior provisions in a form, see parts of Townsend *Ohio Corporation Law Practice and Forms Annotated*, Cleveland; Banks Baldwin Law Publishing Company, 1940; especially page 15: Forms.
6. Somewhat as used in Forms 140, 182 and 183.
7. Failure to mention that Ante-Nuptial Agreements (page 70), and Guaranties (page 525), must be reduced to writing to merit legal recognition seem defensible examples. See 37 C.J.S. 516 *et seq.; id.* 520 *et seq.;* 49 Am. Jur. 375 *et seq.; id.* 416 *et seq.*
8. Citation to Ohio Gen. Code Sec. 12148, page 15, note 2, at best is misleading, in view of its repeal in 1931.
9. One wonders why hundreds of citations contain only a small handful of authorities dating since about 1920, and such a large number of ancient decisions.
10. *E.g.*, page 453; note 2, page 651; text, pages 539, 494, 1172, 272.
11. Isolated references to Blackstone (page 2), Kent (page 428), Pomeroy (page 941), and Prentice-Hall Trust Service (page 1211), stand out because of the paucity of others.
12. *E.g.*, note 11, page 641; note 11, page 1052; notes 1 and 2, page 941.
13. *Cf.* Couse, *Ohio Forms and Precedents*, 4th ed.; Cincinnati, 1940; W. H. Anderson Company. "A form book is chiefly useful . . . as a check against omitting essential provisions". (page iii).
14. Publishers Note (page iv) explicitly warns laymen to "consult their own legal counsel before entering into any contract or business arrangement based on these forms".
15. No form book examined even mentions a warrant of attorney to confess judgment for eviction in leases (8 O.S.U.L.J. 4) or possession in conditional sales contracts (89 A.L.R. 1106).
16. The destructiveness unbridled in labor strife (*cf. Apex Hosiery Co.* v. *Leader*, (1940), 310 U.S. 469, 84 L.Ed. 1311, 60 Sup. Ct. Rep. 982, 128 A.L.R. 1044) creates a wariness in leasing property to large corporations likely to be so involved. I know of nothing published on this.

ized portrait[1] is something like Matthew Arnold's ineffectual angel beating his luminous wings in vain. I continued my reading, which culminated in this competent biography, and concluded that ineffectual Stephens undoubtedly was, but that there was about him nothing angelic and little luminosity.

Stephens, as Mr. Von Abele properly emphasizes, was a minor figure before, during and after the short-lived Confederacy. In almost everything he undertook he, in Browning's phrase, just escaped success. He was not a well-rounded lawyer. He was an uninfluential member of Congress before and after the war. He took little part in the councils of the Confederacy. When he became Governor of Georgia his strength—physical and mental—was so far spent that he was hardly able to perform the routine duties of the office.

Although Stephens' record was largely one of futility, a critical study of him has a place in the larger scheme of things. If, as many agree, history is the essence of innumerable biographies, it cannot be viewed in proper perspective merely in the lives of dominant figures. A part of the story is that of the unsuccessful opposition. Almost always Stephens belonged to and frequently he led the opposition. Bitterly he fought Andrew Jackson and intensely he hated Henry Clay. He offered the resolution for the annexation of Texas and never ceased to oppose the war with Mexico. He defended slavery as morally justifiable and vigorously resisted secession. When his State left the Union, he abjured the old allegiance and never completely surrendered himself to the new.

While Stephens' conduct during the Confederate War was the least creditable part of his career, it is to the reader the most revealing and to the historian the most important. Too little attention has been paid to civil life within the Confederacy. Not generally known is the strong opposition to the Davis government that always existed and frequently found vigorous expression. This opposition was headed by Governor Joseph E. Brown of Georgia; Brown resisted conscription and martial law, sometimes refused to furnish troops, and invariably insisted on appointing the officers. He delighted in hampering every undertaking of the Richmond authorities, and more than once hinted that if the claims of Georgia were not recognized she might secede from the Confederacy. Brown in most of his intransigency was supported by Stephens.

Brown was an eccentric and perverse character. While his conduct smacked strongly of disloyalty, his motives are unfathomable. Stephens, however, was merely exhibiting the defects of his qualities as a lawyer. He was to the end a brilliant legalist entirely immune to the impact of reality.[2] Along with other Southern leaders, Stephens underestimated the resources and resolution of the North and failed to realize that the South's only chance of success lay in a strong government and a quick victory. Stephens, however, went much further. With him liberty under law was a fetish. Successful secession represented liberty, but it must be achieved in conformity with law. Even in the darkest days he seemed to feel that it was better that the cause should fail than that the rights of any individual should be restricted. He was like those generals who, Macaulay says, had rather lose a battle by rule than win it by exception.

There was really no place for Stephens in "the storm-tossed Confederacy"; he was meant to navigate in calmer seas. He was at his best in the determinative part he played in formulating the Constitution of the Confederacy. No one—not even L. Q. C. Lamar, who always had a copy next to his heart—revered more than he the Constitution of the United States. But the instrument he worshipped was a palimpsest overwritten with his own interpretations. In the Confederate Constitution these interpretations were placed in the text. For three-quarters of a century, the centralists had based much of their argument on the first seven words of the Preamble: "We, the people of the United States". The opening sentence of the new document left no room for construction: "We, the people of the Confederate States, each State acting in its sovereign and independent character". The word "slave", for which the founding fathers had substituted various euphemisms, was boldly used. Congress was imperatively forbidden to impose a protective tariff or to appropriate money for public improvements.

The divisive controversies thus dealt with, Stephens and his collaborators accepted the old Constitution as their model and attempted, not without success, to improve it. Making the budget became—as under the British system—an executive instead of a legislative function; the President was permitted to veto single items in appropriation bills; Cabinet members were allowed to sit in the House of Representatives and to participate in debates affecting their departments. Under no one of these provisions, however, was there any normal experience which would be instructive in their current consideration.

So antagonistic had Stephens been to those who conducted the war that peace, even at the cost of utter defeat, must have been a relief. In any event his statesmanship never rose higher than in his advocacy of immediate and complete acceptance of the new order.[3]

No estimate of Stephens can ignore his pathology. All his life he

1. *Confederate Portraits* (1914).

2. After the War between the States, Stephens wrote an inordinately long and intolerably dull book defending his view of States' rights and supporting the abstract validity of the right of secession; in it he disclosed himself as utterly oblivious to the fact that, as the result of "the arbitrament of the sword", the constitutional doctrines which he espoused were as dead and mummified as the Pharaohs. *Constitutional View of the Late War Between the States*. 2 Vols. 1868-1870.

3. In this as in many other respects Stephens was the antithesis of his fellow-Georgian and intimate friend, Robert Toombs, who remained unreconstructed. Of Toombs a story is told which, while apocryphal, is illustrative: Returning to Georgia from Washington the first week in October, 1871, he was greeted by a group of admirers when he appeared on the platform of his car. "What's the news, Bob?" yelled a spokesman. "Great news," shouted Toombs, "Chicago's on fire and the wind's in our favor."

suffered from disease and was tortured by pain. He rarely weighed as much as ninety pounds and always looked as if he were recovering from a long illness. Although he was fond of feminine society and was attractive to women, he denied himself the satisfaction of marriage. As the result of an accident he was, during the last thirteen years of his life, unable to walk unassisted, and during much of this time was compelled to use a wheel-chair. It is not surprising that such a man was oppressed by some of the melancholy of a Byron and felt some of the bitterness of a John Randolph of Roanoke; the wonder is that he abstained from the dissipations of the one and never indulged in the vindictiveness of the other.

The career and character of Stephens gave Mr. Von Abele a challenging and baffling subject. Such an adequate study as this, of so strange and contradictory a personality, is a real achievement. Carlyle was not indulging in overstatement when he said that it is as difficult to write a good life as it is to live one.

WALTER P. ARMSTRONG
Memphis, Tennessee

THE GREAT DILEMMA OF WORLD ORGANIZATION. *By Fremont Rider. New York: Reynal & Hitchcock. 1946. $1.50. Pages 85.*

The peoples of the world are confronted at present with a difficult problem of the division of powers among the different institutions established by them for the governance of their affairs. In the past, the powers of government were divided in most countries between the national government and local administrations of different type and size: Cities, townships, counties, etc. In countries having a federal structure, an intermediary form of government had been added: States, provinces, or cantons. Different governmental functions were allocated to each territorial division and subdivision. But this division of functions was not permanent; it was subject to continuous change. The complexities of modern wars and the ever-increasing economic crises have put a premium on bigness, and more and more functions were taken away from smaller units and transferred to bigger ones.

We are now on the threshold of a new transfer of powers. No state of the world is able to ensure to its people peace and prosperity. The threat of war and of an economic catastrophe cannot be removed by action of any state acting alone. Nor can the problem be solved by any combination of states as long as an important state or group of states remains outside. The military and economic interdependence of nations has reached the point where only a world government has a chance to establish freedom from fear and want. The peoples of the world are almost ready to admit this necessity and to request their respective governments to transfer the necessary minimum powers to a world government.

Even if all peoples of the world request their governments to direct their best efforts toward the establishment of a world government, it will take some time before an agreement is reached with respect to the structure and jurisdiction of that government. While in principle the problems which have to be solved here are analogous to those inherent in any federal system of government, there are some additional difficulties caused by deep differences in economic and cultural development. In consequence, some of the world government enthusiasts have left to others the task of proselytizing and have devoted their efforts to technical details of the machinery of world government.

Mr. Rider, (librarian of the Wesleyan University) belongs to this group of concrete planners. His main concern is to devise an equitable basis for representation in a world legislative assembly. He recommends that "the national voting power should rest upon the relative sum total of the educational accomplishment of all of the citizens of each country" (page 31). The educational accomplishment of a nation may be measured by the number of its literate citizens, by the number of doctoral degrees possessed by its citizens, or by "the total of the years of the individual educational accomplishment of each one of its citizens" (page 40). Mr. Rider has selected the last standard, and has computed on the basis of a considerable statistical research data for all the nations of the world. Although his figures are only tentative and may prove slightly inaccurate after a uniform educational census of the world has been taken, they provide a sufficient basis for preliminary studies.

Assuming an international assembly of 400 representatives and a total educational accomplishment of the world equal to over three billion years, Mr. Rider would give one vote to each constituency of voters possessing about 7.5 million years of educational accomplishment. Nations having a higher educational accomplishment would be divided into two or more "world electoral districts" of equal educational accomplishment. The United States would be divided into 88 districts, the Soviet Union into 59, the British Empire into 43. More than twenty other countries would be entitled to more than one representative. On the other hand, each small country would be granted one representative even where its educational accomplishment is far below 7.5 millions.

Mr. Rider's attempt to solve this basic problem of world organization is not a lonely venture. During the last few years the question of the composition of a world assembly has been hotly debated in world-minded circles. The present reviewer published an article on the subject in the *American Political Science Review* in December of 1944. He took into account the population, agricultural and industrial production (expressed in terms of its dollar value), and international trade of the countries of the world, and distributed votes on the basis of a sliding scale, from four for Paraguay to thirty-eight for the United States. Some

objections to this distribution were raised on the ground that the sliding scale method favored small and medium countries and did not give adequate representation to big ones. Professor Rudd, of the University of New Hampshire, who has previously attempted to work out a similar formula in his pamphlet on "A Method of Balanced Representation", has adopted the data of this reviewer in a paper presented to the Conference on the Scientific Spirit and Democratic Faith in New York on May 26, 1946. He supplemented these data with data on literate population, and translated the total figures for each nation into its percentage of the world totals under each of the four categories. For instance, the United States had before the war 6.2 per cent of the world population, 12.4 per cent of literate adult population, 22.5 per cent of production, and 12.6 per cent of international trade. If we now add together these figures, we shall obtain 53.7, which according to Mr. Rudd should entitle the United States to fifty-four delegates in an international assembly. He adds that even when the sum of percentages is below half per cent, a state should have one delegate.

By substituting Mr. Rider's more equitable figures on educational achievement for Mr. Rudd's figures on literate population, and by translating them into percentages, we shall obtain a new formula which will combine the advantages of both proposals.

One may wish to compare the results thus obtained with a formula contained in a petition to the General Assembly of The United Nations released on February 1, 1946, by the Dublin (N.H.) Conference Committee. This formula was prepared by a subcommittee of this group which took into consideration an earlier set of Mr. Rudd's revision of this reviewer's figures, as well as certain general principles underlying the proposals drafted by Grenville Clark, of the New York Bar, different versions of which were published in 1944 and 1945 (e.g., in the *Indiana Law Journal* for July of 1944). The Dublin petition thus has adopted the principle of equality for the three largest countries—the United States, the Soviet Union, the British Commonwealth—and has allotted to each of them sixty-five votes. On the other hand, like the other proposals, it adopted the principle that each state, however small, should have at least one vote.

The following table gives a comparison between the different proposals discussed above, as well as a list of averages, for all the Members of The United Nations to whom more than two proposals allocate more than one vote. The data in italics for dominions and colonies are included in the preceding data for the mother countries. The data in parentheses were computed by the reviewer on the basis of other figures supplied by the authors of the proposals. In column 3 Mr. Rider's data were substituted for Mr. Rudd's literacy data, after their translation into percentages.

	Rider	*Rudd*	*Rudd-Rider-Sohn*	*Dublin Petition*	*Average*
British Commonwealth	49	(85)	80	65	70
United Kingdom	*(28)*	*27*	*30*	..	*28*
Canada	*(6)*	*8*	*8*	..	*7*
Australia	*(4)*	*5*	*5*	..	*5*
South Africa	*(2)*	*4*	*4*	..	*3*
New Zealand	*(1)*	*2*	*2*	..	*2*
India	*(6)*	*31*	*26*	..	*21*
Colonies	*(2)*	*6*	*5*	..	*4*
United States	88	54	64	65	68(70)
Soviet Union	59	37	39	65	50(70)
China	20	36	32	25	28
France	22	(22)	24	25	23
Colonies	..	*5*	*5*	..	..
Netherlands	7	(11)	12	12	11
Colonies	..	*6*	*6*	..	..
Poland	9	6	7	9	8
Belgium	4	(7)	6	9	7
Colonies	..	*1*	*1*	..	..
Brazil	8	6	6	9	7
Argentina	4	6	5	8	6
Czechoslovakia	5	5	5	7	6
Mexico	4	3	3	7	4
Denmark	3	3	3	4	3
Turkey	1	3	2	5	3
Yugoslavia	2	3	2	5	3
Chile	1	2	1	3	2
Egypt	1	2	2	4	2
Greece	1	2	1	3	2
Iran	1	2	1	3	2
Norway	2	2	2	4	2
Philippines	1	2	2	..	2

This comparison shows that only with respect to some five countries are the discrepancies rather large. In all other cases there is an agreement at least between three of the four sets of figures. At least during the formative stage of the organization, it might be desirable to give every country the benefit of the doubt and to raise its number of votes at least to the average figure. Similarly, the differences between the three leading states should not be accentuated by divergences in voting strength, and each of them might be given seventy votes. Once, however, all the necessary data are available, a more precise formula may be worked out, automatically adjustable to each change in the relative position of the different countries.

While it is the opinion of this reviewer that no single formula can adequately mirror the differences between the nations of the world, he is willing to admit that Mr. Rider's formula, though more crude than the one evolved by Mr. Rudd, is able to obtain results quite similar to those reached through more complicated processes. If Mr. Rider's formula is incorporated into the Rudd formula in place of the literacy standard, the results appear to be even more satisfactory. Thus another advance has been made on the tortuous road to a generally acceptable formula of representation in the world assembly.

LOUIS B. SOHN

Cambridge, Massachusetts

THE WORLD TODAY. *By Nicholas Murray Butler. New York: Charles Scribner's Sons. 1946. $2.50. 225 pages.*

This readable and stimulating volume consists of twenty-four brief addresses and articles. With one exception all were written or delivered during and since 1942. This exception, "The Age in Which We Live," is his high school graduating address in June, 1875, when he was thirteen years old. Rare indeed is the individ-

ual whose published utterances cover a span of more than seventy years. All indicate a continuous interest, and an active though unofficial participation, in world affairs. In the educational field of the last half century, he might well say: "All of which I saw and a great part of which I was."

His writings disclose that these activities were only a part of an amazing range of national and international public problems and movements in which this private citizen was influentially active. The titles of the addresses are indicative of the scope and span of his career. Many of them deal with matters in which American lawyers were actively concerned.

"The American Plan to Prevent War", refers to the first Hague Conference of 1899 resulting in the Permanent Court of Arbitration. "The Age of the Americas" points out that the center of gravity of world affairs has moved, first from ancient Greece and Rome to Western Europe, and more recently but definitely to the Western Hemisphere—a situation imposing a special duty of leadership and firm policy on the United States.

In others he discusses the imperative need of some sort of world organization for the maintenance of peace. While he recognizes there is some similarity and basis for encouragement to be found in the success of our own federal system, he recognizes that a world state is "wholly impracticable" and that the supposed similarity between the success of our system and the application of a similar principle to a world organization can easily be exaggerated.

In other addresses, such as "The English-Speaking People and Liberty", and "English-Speaking People and World Organization", he developed the historical fact that while others may have excelled in their contributions to art or philosophy, the English-speaking peoples' outstanding contribution to the world has been the conception, establishment and maintenance of the principle of law, liberty and freedom of the individual. He says:

> The English-speaking peoples are about to enter upon the greatest responsibility that has ever fallen on any people in the history of mankind.

The problem of labor and industrial unrest is discussed under "Industrial Civil War", "Economic War on Democracy", and "Industrial Civil War Must End". The attempted settlement of such disputes by lockouts and strikes seems to him to be an abandonment of the methods of civilization and a survival of the age of force and violence:

> The purpose for which a strike is undertaken may itself be commendable, but the strike is not the method to achieve it.

Other addresses have a personal flavor almost reminiscent in character. That delivered before the Carnegie Foundation for the Advancement of Teaching not only gives us a very interesting, intimate picture of the rare personality and character of Andrew Carnegie, but also informs us that Dr. Butler was for years one of Carnegie's most intimate advisers and associates in regard to the establishment of the various Carnegie Foundations and other vast benefactions.

> I happen to be the only person living who was his consultant, his adviser, and his intimate friend, in relation to each of them.

The extent and nature of his personal participation in American and European affairs is partly disclosed in "Democracy in Action", written February 12, 1946. He has been a close friend and confidant of six Presidents of the United States and has attended every National Convention of his party from 1880 to 1932, being a delegate to all of them beginning in 1888. He says:

> Likewise, in European countries, I have had for a full half-century similar experiences and have seen like forces in action.

In the affairs of European countries he acted as confidential unofficial intermediary between the German Kaiser and the British Liberal government from 1905 to 1913, as a consultant with both the French and the German governments, and also with the governments of Italy and Greece in the period between 1926 and 1930. These activities were "unknown to the public", and "each one of them illustrated how democracy works in practice through the efforts to solve vitally important problems."

These personal references were not intended by him to be biographic, but were written in support of his thesis that after all, the success of democracy will depend on creating an informed public opinion on important matters of public concern. The building of such vigorous public opinion cannot be left to chance but must receive the active, intelligent help of the private citizen if democracy is to survive and prevail.

W. G. McLAREN

Seattle, Washington

UNITED NATIONS ATOMIC ENERGY COMMISSION: *Report of the Scientific and Technical Committee. September 27, 1946. Published in mimeographed form by the Commission: Lake Success, Long Island, New York, 24 pages and 3 appendices.*

In wrestling with its life-and-death problem the Atomic Energy Commission of the United Nations asked its Scientific and Technical Committee this question:

Can atomic energy be controlled?

Not, *how* can it be controlled, but is *any* effective control possible?

The answer is: "We do not find any basis in the available scientific facts for supposing that effective control is not technologically feasible". (page 24).

That is good news from the most authoritative source in the world.

And there is an added ray of sunshine because the chairman, Professor H. A. Kramers states: "Our discussions were carried on in an amicable spirit, and there is unanimous

(Continued on page 809)

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EDITORIAL OFFICE
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Respect for the Courts?

What can be expected of the average citizen, by way of confidence in and respect for our Federal Courts, when a member of the Bar who served long as Secretary of the Interior and was in the Cabinet of two Presidents but has now fortunately been freed to devote himself to his column in Left-wing newspapers, starts his column for October 7 by saying flippantly: "When the three 'learned' judges sitting *en banque* (or should it be in bunk) bewailed the fact that they were helpless", etc.?

From his deriding of the three experienced and conscientious jurists who sat in the Georgia case, Harold L. Ickes turned his guns next on the Supreme Court and its decision in *Colegrove* v. *Green* (the Illinois Congressional district case), decided June 10. "This decision also strained at a gnat and swallowed a camel", he declared, and also called it "outrageous" and a "minority" decision, although it was rendered by four of the seven members of the Court, which heard the case, with Mr. Justice Jackson absent and Chief Justice Vinson not yet on the bench.

The former Secretary poured forth especial scorn for Mr. Justice Frankfurter's observation that "It is hostile to a democratic system to involve the judiciary in the politics of the people." He asks the Justice: "How would you ever have come to occupy the high seat from which you can presume to speak with such authority if it had not been for the 'politics of the people'?" Presumably Mr. Ickes' contempt for the Court is not greater than it was when he was a part of the Administration which appointed its members, but he is more outspoken.

Men in high place undermine basic American institutions and freedoms when they deride the Courts and hold them up to public scorn. But that is Mr. Ickes' present "party line", in disregard of his responsibility as a lawyer. The privilege of counsel for a defeated litigant to "go down to the tavern and cuss the Court" has been recognized in America, at least from Abraham Lincoln's time; for a lawyer to commercialize his contempt for Courts and decisions is something else. Some day the Courts and Bar Associations should be in a position to deal with such infractions as they deserve.

Full-Scale Annual Meeting

As this issue goes on the presses, members of the Association, from every part of the country, are coming together in Atlantic City, New Jersey, for the Association's 69th Annual Meeting.

Only in small part is it practicable to report in this issue any of the events of the week of October 28-November 1. Our December and January numbers will be devoted considerably to the usual chronicles of the proceedings, for the information of all members who cannot attend.

This is the first full-scale meeting of the Association since war cast its blight. For the first time in several years, the sessions and deliberations will be of the old-time duration and comprehensiveness. The presence again of able lawyers from other lands is giving to the conferences and the social events an added distinction and significance.

Due to the scarcity of hotel accommodations and the severity of travel conditions, the attendance is not nearly as large as it was ten years and less ago, when the membership was smaller but the members and their wives could come in comfort. It is nevertheless a good-sized convocation, having in mind the averages of years past. The interest and the enthusiasm manifest will be carried home to many communities.

With the membership of the Association at the highest point in its annals and still increasing, and with a notable record of legislative and other accomplishments giving zest to the new tasks at hand, the stage is set for spirited sessions.

In the background, however, there will be a continuing awareness of the perilous state of the world, of the grave problems which threaten chaos to our own economy and cherished institutions, and of the insidious forces against which the lawyers of America must contend with all their might. Above all, the Association and its members have helped in recent years to inform and unify their country on great issues.

The paramount need today is for a united America —steadfast, patient, faithful to enduring principles, and of singleness of purpose to hold fast to the right. This is no time for division or non-essentials or in pursuit of ultimates. This Annual Meeting will rise to and fulfill a great opportunity if it fosters the solidarity of the profession of law as the best means of integrating and

bringing about an America united in support of American policy and ideals.

Practicalities as to a "World Assembly"

There has been a great deal of loose talk, and some learned discussion, of the eventuality of a "world legislature" and the principles or methods on which the representation of Nations or peoples in it could be based. The House of Delegates of the American Bar Association has advised consideration of the principle of "weighted representation" in the General Assembly of The United Nations, as condition precedent to vesting the Assembly with specifically defined and clearly limited powers of legislation as to matters wholly international and non-domestic.

To many it may seem to be remote, academic, impracticable, to speak and write of such things now; but it cannot be too early to study, search out, and comprehend, the practical difficulties involved. Few of those who speak eagerly of "weighted representation" have thought the problems through.

In a realistic review of Fremont Rider's book, elsewhere in this issue, Louis B. Sohn comes to grips with some of the fantasms of formulae. It is plainly time for our serious thinkers to get down to realities and call a spade a spade, to see whether the American people want to play a game on those provocative terms. As usual, Mr. Sohn has given helps to straight thinking.

Perhaps characteristically, the agitators for "weighted representation" put their computations of intricate formulae ahead of the basic, unanswered question as to whether, in view of the persistent withholding of cooperative agreement on the part of the Soviet Union and its satellites in The United Nations, the American people will wish to entrust substantial powers at this time to a "world legislature", however constituted, in substitution for the present method of international "legislation" by agreement, treaty and convention, under which each Nation, including the United States, is left free to decide and act as to approval, according to its own constitutional processes.

Great Tributes to the Great

In submitting to us his vivid and sympathetic memoirs of the late James C. Carter, Frederic R. Coudert reminded us of the classic tribute which Joseph H. Choate wrote as to Carter, in the year-book of the Association of the Bar of the City of New York more than forty years ago. Coudert of course knew Carter only in the later years of Carter's life and when Coudert was very young.

Our distinguished contributor made the valued suggestion that, instead of giving first place to his own personal recollections of the illustrious American Barrister of the Common Law, we should publish the appraisal which a great lawyer wrote, in his own inimitable style and with transcendent personal affection, to summarize the personality and the professional work of his collegemate, frequent opponent, and cherished friend through two generations. In these times, such a personality and career as Carter's stands out like a flame in the night.

Your Editor had not read, and had rarely thought of, Choate's ineluctable appraisal of Carter, during the more than forty years it had been buried in an unscanned tome in a few law libraries (Association of the Bar Annual Reports, Vol. 5; 1903-06). Probably no finer things were ever written more skillfully and sincerely, by one lawyer concerning another. Unfortunately, our space, curtailed as it still is by the paper shortage, precludes the printing of more than excerpts from a narrative that was truly worthy of its subject.

In that connection, our distinguished contributor makes a suggestion which is worthy of being heeded if and when paper supply and publishing conditions permit. Such an appraisal as Choate's of Carter, with true eloquence and elegance of speech, seems to Coudert to be "too valuable a thing to be buried away in Bar Association Reports". He says that "I sometimes think that some publisher should take up the publication, in book form, of some of these memorials of great lawyers of the past. It would show how some of our foremost lawyers were thought of by their celebrated contemporaries. It does seem to me a pity that this material of unique value should be lost to the profession and the public by remaining buried in inaccessible technical publications".

Unfortunately, your JOURNAL cannot today furnish or suggest a practicable answer. Our research has yielded an awareness of the wealth of inspiring material. Perhaps some day we can do or suggest something.

By the way, did our readers of Coudert's narrative find themselves face to face with the fact that, in an era of greatness of the Bar, James C. Carter came to grips again and again with the same fundamental verities, as to which Ben W. Palmer has lately tried to arouse the Bar to a fresh and courageous realization?

From the Bar of Canada

They do things differently in Canada than in the United States, as to such things as their Chief Justiceships and the presidency of their Bar Association. In the parliamentary democracy to the north of us, a Chief Justice may become the President of the Canadian Bar Association. Chief Justice J. C. McRuer, of the High Court of Ontario, was elected President of the Association at the end of August, and came in that capacity to the conferences held under Association auspices in New York in mid-October.

In Canada, the President or a retired President of its Bar Association is deemed to be a natural selection for high judicial office.

In the United States, our highest judicial offices are not filled by selections from among the experienced lawyers who are leaders of our Bar Associations, and the incumbents of high judicial office do not become Presidents of the American Bar Association. Why the difference? Is it in our Bar Associations, or in the motivations and bases of judicial selection?

President McRuer's cordial greeting and timely plea to American lawyers, which is published in this issue, will be most warmly reciprocated by our members. He speaks in an earnest mood, and in behalf of great objectives, which we of the States would share. He takes heed of the critical stage of the world, and recognizes the immediacy of the need that the lawyers of the two countries shall work together to establish the rule of law and justice as the means of peace and order in a world bewildered by the confused voices of tired little men whom the war enabled to gain powers beyond their capacities.

The Work of the United States Courts

Every member of the profession of law should be interested in the report as to the trends in litigation and the accomplishments in the dispatch of judicial business in the Courts of the United States, as presented to the Judicial Conference of Senior Circuit Judges on October 1, by Henry P. Chandler, Director of the Administrative Office. A summary is published elsewhere in this issue.

The competence and comprehensiveness of this annual survey are a tribute to both the diligence of the Director and the judgment of the Association that the establishment of the Administrative Office was an objective worthy of the Association's sustained efforts.

The over-all picture is reassuring also. At a time when several factors have combined to undermine the veneration and confidence which Americans have traditionally had for their Courts, this report by Director Chandler reminds that the work of the federal judicial system as a whole is carried forward with an increasing efficiency and celerity, in all parts of the country and that impartial, law-governed justice prevails.

The Association's new Committee on the Judiciary has delicate and difficult tasks of vigilance and plain speaking before it in its current meetings. No agency of the Association was ever charged with a more solemn duty or a greater responsibility. Yet in the background of its deliberations will loom large the facts as to the continuing acceptability of the justice administered by the federal Courts as a whole and the prospect that, if supported by an outspoken opinion on the part of the profession and the public, the incumbents of judicial office will gain and grow in stature, independence, and devotion to high standards of impartiality and competence in their work.

More Member-Readers Needed

A surprising number of members of the Association have written us to express their approval of what the JOURNAL is trying to do, to interest lawyers in thinking and taking action for fundamental objectives. We publish a page or so of these letters. The returns from the Questionnaire sent to all members in October indicate thus far a ground-swell of approval and support.

Those who hold those views can do first one tangible thing to support them. The JOURNAL should go each month to at least 50,000 lawyers, instead of the present all-time high of 38,000. New communities or new circles of influence can thereby be reached.

Membership committees and the Headquarters staff of the Association have been making headway in increasing the membership. Our readers can do the most, if each of them who wishes to support our efforts will obtain and send in at least one or two proposals for membership. There are non-member lawyers in almost every law office.

We have a growing list of non-member subscribers also. For the most part they are not lawyers. The JOURNAL should be in every library and reading-room in America.

Lawyers in the Smaller Cities

Throughout the long history of our Association, and especially since its reorganization in 1936, a great deal of the leadership, initiative, and momentum of the Association has come from members who live and practice law in the smaller cities and towns. Reminder of this comes with the news that Eugene C. Gerhart, a 34-year-old member of the Junior Bar, who resides in Binghamton, New York, an upstate city with a population of about 78,000, has won the $3,000 Ross Essay Prize for 1946.

To our July issue (32 A.B.A.J. 397), he had contributed a pragmatic article on his preparations and experiences in "Going It Alone", in establishing his own law office in a small industrial city in a rural area.

This young lawyer evidently has developed an ability to think, as well as a skill in research and in clear expression. On the vital subject of labor disputes and the use of judicial process in solving or ending them, he has written a thoughtful and mature paper, which won a unanimous verdict from the eminent judges of the competition. It is published in full in this issue, and is well worth reading.

Young Gerhart's success confirms an impression, which we have had for some time, that a great deal of worth-while thinking as to our country and our pro-

fession is taking place among the lawyers in the smaller cities and towns throughout America. Among these members of the Bar there is a deep concern about many things which are taking place, and these men are trying to think the problems through, to make known their views about them, and to find some way for translating views into action.

We hope that the JOURNAL can be the medium for the expression and exchange of their views and experiences. We would like to be the means of making known to the whole profession and country what is going on in the minds of the lawyers, young and old, especially in the smaller cities and towns. There must be Gerharts in every State, if they will take the time to write clearly and persuasively.

We are by no means sure that our still limited space will permit the publication of all the contributions which are submitted to us. Selection or condensation may be necessary. The JOURNAL would like to reflect the opinions and experiences of the profession in all localities.

Young Lawyers in Action

Indications multiply that there is abundant reason for what Incoming President Carl B. Rix said, in his statement to the JOURNAL, as to the sense of disillusionment and frustration which our younger members are feeling keenly, as to the state of affairs in their country, upon their return from serving it in uniform.

Unlike many of their elders, they are by no means content to do nothing about it. They want to go to work, in their Bar Associations, in politics, and their home communities, to try to do something about it, even in a small way. They wish to get busy before it is too late.

Rightly and naturally, these young lawyers turn to the American Bar Association for direction, guidance, perhaps leadership. It is a new and difficult problem. Evidently it is one to which President Rix is giving a great deal of thought. His consultations with many leaders in the Association may produce a program for action.

An Appeal to Lawyers

Attorney General Tom C. Clark made public on October 10 an appeal by him for the vigilance and cooperation of all lawyers in behalf of the observance and enforcement of law in local communities, and especially the prevention of "mob violence". To that end he sent a letter to President Willis Smith of our Association and to the President of each State Bar Association.

The chief law officer of the federal government announced his intention to use to the utmost the federal powers of investigation, etc., but he confessed the inadequacy of the federal statutes to cope with "local disorders". In the opinion of many lawyers, the statutes already go beyond the intended constitutional limits of federal powers.

Indeed, Mr. Clark states it as his opinion that "local disturbances are best solved by local action, and this is in accord with our political traditions". He asks lawyers and local authorities to help out where federal statutes are ineffective, rather than that federal intervention in "local disturbances" shall be undertaken only where State and local action has failed.

In the opinion of many lawyers, existing federal laws have precipitated or abetted violence and disorder in very many communities, in connection with strikes and picket-lines. The Attorney General does not mention these.

We think that the Bar Associations and lawyers will gladly do all they can to inculcate respect for impartial laws and to help enforce the observance of them against "mob violence" in their home communities. A first step is to restore to federal laws a fairness and fidelity to constitutional limitations that will assure that they serve no selfish interests of "pressure minorities" or majorities and are four-square with the American sense of fair play. Local legal authorities and local public opinion mobilized by the lawyers could do the job so well that Federal interference on any pretext would be proved to be unnecessary.

Many Thanks to Our Readers

We take this means of expressing our hearty appreciation to the many thousands of our readers who have taken the time and thought to fill out the Questionnaire which we sent to all members of the Association and all non-member subscribers. The response has been beyond our anticipations, both as to the number returned and the extent of the interest evinced.

Any Questionnaire is difficult to formulate and to answer. The resultant statistics are at least highly indicative. The thousands of "Additional Comments" written in are most helpful.

Many readers took the time also to write us letters, expressing approval of the idea of such a referendum or offering specific suggestions to improve the JOURNAL. These letters are in too great a number to be answered individually. We express here our thanks for them.

In our December issue, we shall hope to present and comment on the over-all results of the Questionnaire. If you have not sent it in, you still can help by doing so.

Mr. Justice McReynolds

In accordance with our immemorial custom, we record the passing of a gallant, outspoken, leonine figure in the legal profession in America—the late Mr. Justice James Clark McReynolds, a retired Associate Justice of the Supreme Court, who was appointed to that bench in 1914 by President Woodrow Wilson under whom he had served as Attorney General, and was ever one of the

most controversial figures in the Court during the days when it was being subjected to political attack.

This Tennessee lawyer won renown in his profession before he ascended the bench. He retired from the Supreme Court on February 1, 1941, two days before his seventy-ninth birthday, having been an Associate Justice during more than twenty-six years. He was a native of Kentucky, with Virginia and Scottish forbears. He practised law in Nashville and New York City, "for many years", and served as Assistant Attorney General under President Theodore Roosevelt. He believed staunchly in the rights of "the indestructible States", and strove with all his might in the Court to prevent them from being destroyed, by judicial decisions or by legislation.

As the men with whom he had served long in the Court began to leave it, through retirement or death, he became its chief dissenter, as Holmes and Brandeis had been when they were in the minority. At the close of the term in June of 1939, he had disagreed with the majority in thirty-four opinions; Mr. Justice Butler was second with thirty-two dissents.

In the "gold-clause" decision, in which the majority held in *Norman* v. *The Baltimore & Ohio Railroad Company* that gold payment of private bonds could not be enforced, Justices McReynolds, Butler, Sutherland and Van Devanter dissented. Justice McReynolds, who delivered the minority opinion, denounced the majority opinion as a "repudiation of national obligations" and declared from the bench that the dissenting judges felt "shame and humiliation".

"It seems to us impossible to overestimate the result of what has been done here," he said, and, referring to the Constitution, added that it did not seem "too much to say that it is gone". In his written opinion he said: "Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling."

In dissenting sharply from three decisions upholding the Social Security Act in May, 1937, Mr. Justice McReynolds delivered a pungent homily from the bench. "We should keep in mind that we are living under a written Constitution," he said.

"No volume of words and no citation of irrelevant statistics and no appeal to feelings of humanity can expand the powers granted by Congress," he said. "Neither can we, by attempts to paint a white rose red, view the situation differently from that seen by the fathers of the Constitution. This Government is a Union of indestructible States. There can be no Union without the indestructible States. If the States are destroyed then the Union is destroyed."

Perhaps wisely, in juridical times which seemed to him to be irreparably "out of joint", this rugged and fearless jurist decided in 1941 to retire, while "in the full possession of my faculties and health." He continued to enjoy the company of friends, but took no part in official or public activities. Chief Justice Vinson on October 7 justly referred to him as "a vigorous, capable, determined and forthright member" of the Court, who had "a distinguished career and a life of devotion to duty."

Canadian and American Cooperation

While the people of Canada and the United States have reason for their sense of satisfaction that their two countries are at last joined in their adherence to the International Court of Justice and their acceptance of the compulsory jurisdiction of the Court, it is timely to give some thought to the circumstances under which this fortunate result for peace, justice and law in the world was brought about. The presence in Atlantic City of distinguished jurists and lawyers of Canada gives timeliness to this observation.

Canada had long been a party to the Statute of the Court and had filed a Declaration of its acceptance of the Court's jurisdiction as obligatory in the enumerated classes of legal disputes. Not so the United States. Nearly twenty-five years of effort by the American Bar Association and by many spokesmen of public opinion south of the border had not availed.

The picture changed when, during the winter of 1944-1945, the Bar Associations of the two countries joined hands in an aggressive campaign in support of the Court and its Statute. The future of those instrumentalities of international justice seemed then very uncertain, because of the dubious status indicated for the Court and for international law, in the Dumbarton Oaks Proposals of October 7, 1944.

Through their respective Committees, the lawyers of Canada and the United States went to work to rally and mobilize public opinion in both countries. Hitherto there had been staunch friendship and a feeling of kinship. On this there was builded, for the first time, a tangible program of team-work for specific objectives. A joint program was developed by the two Bar Associations, with the aid of many representative Regional Conferences of lawyers and jurists throughout the two countries.

These definitive recommendations were placed before the Committee of Jurists in Washington and the San Francisco Conference of The United Nations. Strongly supported by the representatives of the two Bar Associations, they were welcomed; and they had great weight, far beyond what could have been achieved if they had come only from either. The unity of the profession of law in North America was decisive.

The great Conference produced an improved Statute, annexed it as an integral part of the Charter, and made the Court one of the principal organs of The United Nations. The United States, as well as Soviet Russia, thereby became parties to the Statute of the Court for the first time. All this was a vast advance. It

really settled the issue that America would in time accept the jurisdiction of the Court as obligatory.

A year of hard work was required to bring that about. Leadership in that fight devolved naturally upon the American Bar Association, as Senator Morse, author of the famed S. Res. 196, attests elsewhere in this issue. The good faith of America's full participation in The United Nations assured that the action would be favorable whenever a vote in the Senate could be secured. Time was all-important. Opposition vanished when the roll call was called on August 3. Only two irreconcilable Senators who had opposed the ratification of the Charter were recorded against the World Court. The ground-work for that outcome was laid when the joint recommendations of the lawyers of the two countries were accepted in San Francisco.

New tasks remain and new vistas loom, for organized cooperation between the two Bar Associations, in matters such as the statement or codification of a forward-looking international law and the strengthening of its authority. The Canadian Association took action to that end; several members of their distinguished Committee came to New York in October, and later to Atlantic City to confirm that team-work and initiate the plans of the two countries.

What the two Associations have done together since March of 1945 is a service to their two countries and a source of pride and enhanced prestige to the organized profession in both countries. Certainly this broadening of relationship and this leadership in the work for peace have had that effect in the United States, and have affected favorably the consideration of our Association's proposals, as to domestic as well as international matters.

To our brethren of the Bar of Canada, whose representatives brought to the October Conference of the two Committees and to our 1946 Annual Meeting such heartening messages and such an impression of readiness to go to work to save and integrate the institutions of freedom under law, we extend the hearty felicitations and the thanks of American lawyers for the privilege of joining hands with them in a great cause. We venture to express the hope that this fruitful team-work has only been begun and will be continued in other phases of the ageless struggle to establish on always firmer footing the supremacy of law, liberty and justice on this Continent and throughout the world.

The Founders' Plans for the JOURNAL

An Interesting Retrospect

Your Editor was lately browsing in the first issues of the JOURNAL, as a monthly, to see if your publication has strayed far from the ideas and ideals of its founding fathers. The suggestion has been made by some that a number of recent articles in the JOURNAL have been so personalized and informal in treatment, and others so literary in quality, as to be readable, even enjoyable, and thereby violative of the tradition that the organ of a Bar Association should be dull.

Monthly issuance of the JOURNAL dates from September of 1920. It was then called, rather awkwardly: "Journal Issued by American Bar Association". Before that it had been a law quarterly. Its first Editor-in-Chief as a monthly was Stephen S. Gregory, of Chicago, a renowned and gifted lawyer who had been President of the Association in 1911. Among his many-sided qualities, he had the spirit, soul and sure-footed skill of a great journalist. As an editorial said of him when he died after putting "all he possessed" into the preparation of the first three numbers: "when he chose law, journalism lost a great potential power". Lawyers who have lately helped us by struggling with our questionnaire may be interested in checking with us as to how much we have wandered from the paths he pioneered.

In the first issue the editorial "Explaining Our Appearance" stated what the present Board of Editors would regard as the ideal for this publication: "It can become, in brief, in the nature of a monthly meeting of the Association attended by the entire membership and further encouraging that 'cordial intercourse' among the members of the American Bar which the Association proclaims as one of its main purposes". To make that a reality through the use of words and type on paper is not so easy. The editorial further said that "It is not at present intended to enter the field now so well filled by the old and well-established law reviews and periodicals. It is anticipated that, as a rule, our leading articles will be of a rather less technical and more general character; and that the items of professional interest which we gather will be of a somewhat more personal character and more immediately related to the activities of the Association and kindred bodies and of our membership".

This avowal suggested to your Editor the possibility that your publication may have lately become inclusive of articles of the type projected by its first Editor-in-Chief. If his initial announcement was meant to negative the publication of serious and scholarly articles, no such pattern was followed. In the first issue (September), John W. Davis, then Ambassador to Great Britain, discussed the topic still timely of "Treaty-Making Power in the United States". A young man named W. Eugene Stanley, of Kansas, who has since risen to maturity and leadership in the Association, wrote of the new Kansas Industrial Court Act, while a member of the Dublin Bar narrated the "Sinn Fein Courts in Action". "Creating a World Court of Justice" was pleaded for, with material from British sources, and Wilmer T. Fox wrote of "Business Methods in a Lawyer's Office".

Editor Gregory began writing very animated comments by way of "Review of Recent Supreme Court

Decisions". Its announced scope was "to deal with cases of the greatest professional importance, particularly those dealing with constitutional questions". Editorially, the efforts to establish Federal rules of procedure were referred to somewhat cynically, as the products of Bar discussions "sometimes rather amusing to a lawyer experienced in forensic controversy", but the idea of rules was generally approved for "all actions at law other than criminal prosecutions".

Nothing in the realms of law, politics or life, seems to have been regarded as tabu. The feature of the first issue was "A Message from the Nation's Next President to the American Bar Association", which consisted of fulsome letters to Mr. Gregory from Warren G. Harding and James M. Cox, then rival candidates for the Presidency, neither of them lawyers. A leading article (unsigned but with hall-marks of Mr. Gregory's workmanship) analyzed and discussed "National Party Platforms and Candidates" in 1920. The first issue contained also a page and a half of a "Fable in Slang", by George Ade, with a cartoon by John T. McCutcheon, of which the moral was: "An Associate Counsel should weigh at least 200 pounds".

The second issue found Reginald Heber Smith and Charles Evans Hughes writing of "Justice and Need of Legal Aid for the Poor".

The third issue contains evidence that the JOURNAL may now have wandered from its founders' concepts. The first article is headed "Senator Harding and His Buddies"; it discussed playfully the pipe-smoking, golf-playing and tarpon-fishing proclivities and the boon companions of the President-elect, but concluded: "He is going to listen to reason, but the reason for action must be four-square with the interests of America. . . . And if these impressions of the man prove out of focus, they are simply those of an individual who has to weigh personalities and has made mistakes".

The second article was entitled "Ball and Bench". It discussed facetiously, and none too favorably, the putative qualifications of Judge Kenesaw M. Landis to become the supreme ruler of baseball, the inadequacy of Federal judicial salaries, and the propriety of his holding both jobs. Featured articles were on the judicial system of Czechoslovakia and on "Analogies in Islamic and European Law", perhaps not of absorbing concern to practising lawyers in 1920, and on the disbarment of one Jacob Margolis on the initiative of the Allegheny County (Pennsylvania) Bar Association, for violating his oath as a lawyer to support the Constitution of his country and State, by his advocacy of "the doctrines of anarchism, syndicalism, and Bolshevism, and his activities in connection with the Industrial Workers of the World and other organizations of anarchistic and revolutionary tendencies". This "sanitation of the Bar" was strongly commended. Perhaps it was the first resort to that "legal woodshed" to which Attorney General Tom C. Clark recommended that the Bar Associations should take some of "our too brilliant brethren" (32 A.B.A.J. 453-457).

What was the response of the Bar to the new monthly with such a pattern? Letters deluged the October issue; by no means all of them expressed approval. The President of the Hudson County (New Jersey) Bar Association thought it "a doubtful venture". Aaron A. Ferris, of Granville, Ohio, questioned the authority of the Association to start such a publication, in a competitive field in which "we have a surfeit already". J. Barley Wray, of Tennessee, wanted to receive from the Association "some kind of periodical every two weeks". J. P. McBane, of the University of Missouri, wanted the JOURNAL made "a kind of a *Literary Digest* of law and legal literature"—well, that publication went to the "boneyard" and the JOURNAL is still here. Frank W. Clancy, of Santa Fe, New Mexico, felt "impelled to say that the new form of the JOURNAL is quite abominable and that it looks like a descent to the common level of monthly magazines of which the country already has too many". He closed his letter with a couplet which has been sent to many editors—perhaps some of our readers will find it convenient and appropriate now:

> "I do not like thee, Dr. Fell,
> The reason why I clearly (sic) tell;
> But this I know, and know full well,
> I do not like thee, Dr. Fell."

These episodes from the archives may amuse and help those who are thinking about our problems. The Association and the JOURNAL have travelled far and changed much, since September of 1920. That first issue as a monthly went to about 12,000 members; this issue will go to more than 38,000 members and to about 1,000 others. The JOURNAL has tried to keep pace with the changes in the Association, and to be of increasing assistance to the profession and the public. "Brick-bats and bouquets" are the traditional fortune of editors, now as in 1920; both are welcome and useful. By the way, if you have not filled out and sent in the questionnaire which you recently received from us, you have not yet helped us as you can do, toward making the JOURNAL what our members want it to be. When the results of that questionnaire to the whole membership are tabulated, we shall know for the first time what our members think and want, as to their JOURNAL.

WILLIAM L. RANSOM

A Message from the Lawyers of Canada

by J. C. McRuer

CHIEF JUSTICE OF THE HIGH COURT OF ONTARIO; PRESIDENT OF THE CANADIAN BAR ASSOCIATION

The Editors of the *Journal* have kindly opened their columns to me, to enable me to send greetings to the American Bar Association and its members as I assume the duties of President of the Canadian Bar Association.

■ We have just concluded our first annual convention since the cessation of hostilities. These annual meetings of our respective Associations have for many years been marked by an interchange of friendly representation which I trust will develop in the future toward the achievement of ends that must be common to all thoughtful members of our profession. After viewing the past seven years in retrospect and now with eyes directed toward the obscurity of the future, I think the note that our members would have me sound, in greeting their fellow members of the legal profession in the United States, is one of determination that the ultimate supremacy of the rule of law must prevail in a world distraught with international distress and disturbance.

Under the pressure of the demands of self-preservation in wartime, scientific development has gone forward far in advance of any comparable progress in the science of government which enables men to harness and regulate the product of scientific research. In some respects it may be that it is the lawyers who are to blame. It may be that we lawyers and judges have been too busy merely trying and deciding cases to give the painstaking thought to the larger contribution that must be made in order to evolve a legal process by which human beings of diverse racial and social origin will be enabled to live at peace with one another.

The rule of law in domestic affairs or in international affairs can only be really effective if it is founded on an enlightened and responsible public opinion. The rule of law is the fruit of the growth of civilization and the progress of civilization is marked by the estimate put upon human values. We who enjoy the heritage of the common law believe that we have in it the philosophy of life that places those human values above all others.

But internationally, there is no common law nor is there an international civilization that demands for mankind ordinary human rights. May I suggest that the lawyers of Canada and the United States of America may well set themselves to the task of giving united leadership to the creation in our countries, and ultimately throughout the world, of a public opinion that will demand that all disputes between peoples and races may be settled by organized legal process before judicial tribunals just as independent and just as responsible as the Courts of justice of our respective countries.

To some this may be fantastically idealistic, but we are living in centuries of time and not in days. Who would have dared to dream, some three hundred years ago, that the peoples of a continent twice as large as the whole of Europe could live together in absolute trust that all their national and international difficulties would be peacefully resolved by legal process?

It is for the lawyers and judges to co-ordinate all those influences that stimulate an irresistible demand for international justice, the inevitable consequence of which would be a body of international law accepted by all Nations. No matter how often our efforts fail, our two Associations must never lose confidence in the ultimate triumph of the rule of law as the absolute governing force regulating the affairs of the world.

Among Our Contributors

● FREDERIC RENE COUDERT, who writes unforgettable recollections of James C. Carter, is one of our foremost authorities on international law and an outstanding leader in many good causes for Bar Associations and the public. Born in New York in 1871, graduated from Columbia in 1890, admitted in 1895 to the firm of Coudert Bros. of which his distinguished father was a member, our contributor is still in the active practice of his profession. He has been adviser and counsel for his own and foreign governments, President of the American Society of International Law, delegate to many international conferences of jurists, recipient of honors from foreign governments, author of many articles in law periodicals which have reflected his mature scholarship and his intense devotion to his country and his profession. Our readers are fortunate when so gifted a lawyer puts to paper, for this and future generations, his memories of one of the truly great who already is forgotten or unheard of by most of the lawyers of today.

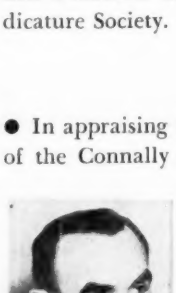
F. M. COUDERT

● Nicholas Murray Butler's new book *The World Today* is reviewed for us this month by WILLIAM GARDNER MCLAREN, of Seattle, Washington. He was born in Iowa in 1875, received his A.B. from Grinnell College in 1898, was graduated from Iowa State University Law School in 1902, and admitted to the Washington Bar the same year, where he has been active in the practice of law ever since.

W. G. McLAREN

He has served his State in many capacities and presently is a member of the Board of Uniform Law Commissioners for the State of Washington. McLaren has been a member of the American Bar Association since 1922, and from 1937-40 was a member of the Board of Governors. He is also a member of the American Law Institute, American Academy of Political and Social Science; former president of both the Seattle and Washington State Bar Associations, and a director of the American Judicature Society.

● In appraising the potential effects of the Connally amendment of the Morse Resolution (S. 196), the views of the militant lawyer, a former dean of law, who introduced the Resolution and made an outstanding fight for its adoption, will be of interest to our readers. Senator Morse interrupted his Oregon vacation to write a statement especially for this issue of the JOURNAL. He does not wholly share Lawrence Preuss' apprehensions. (32 A.B.A.J. 660) Senator Connally's views were quoted in 32 A.B.A.J. 543. Interested readers may thus choose between the three statements, in forming their own opinions.

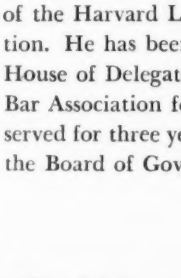


WAYNE L. MORSE

● FRANK WASHBURN GRINNELL, who comments in spirited fashion on four of our recent articles, was born in Charlestown, Massachusetts, in 1873. He was graduated from Harvard College and from its Law School in 1898, and is a member of the firm of Hale and Dorr, in Boston. He has been Secretary of the Massachusetts Bar Association and Editor of the *Massachusetts Law Quarterly* since 1915, and Secretary of the Massachusetts Judicial Council since 1924. He is also Secretary of the Harvard Law School Association. He has been a member of the House of Delegates of the American Bar Association for many years, and served for three years as a member of the Board of Governors.

FRANK W. GRINNELL

● BEN W. PALMER, active practising lawyer in Minneapolis, polemic legal scholar, contributes this time an enlightening essay, "Liberty and Order: Conflict and Reconciliation" (prefaced with a sonnet of his own) on the everlasting conflict between liberty and order, freedom and overweening government. Biographical details of him were given in 32 A.B.A.J. 605.



BEN W. PALMER

Bar Association News

The Bar Association of Baltimore City

An incident unprecedented in the annals of Bar Associations, but having much significance as to their objectives, was brought to a close on September 3, 1946, when the Court of Appeals of Maryland handed down its decision in the proceedings brought by Horace T. Smith, Webster C. Tall, James K. Cullen and Wilfred T. McQuaid, members of the Baltimore Bar, in the Circuit Court of Baltimore City, to obtain a declaratory decree and preliminary injunction against Paul M. Higinbothom, President of the Bar Association of Baltimore City, Charles C. G. Evans, chairman of its Committee for the Nominating and Election of the Sitting Judges, and the Bar Association of Baltimore City, a body corporate. The Circuit Court dismissed the bill. Given below are excerpts from the opinion of the Court of Appeals in sustaining the dismissal:

"The bill of complaint filed on June 7, 1946, alleges that complainants are candidates for Associate Judge of the Supreme Bench of Baltimore City, subject to nomination in the Republican primary election on June 24, and that they possess all the qualifications for that office; but six judges, Michael J. Manley, E. Paul Mason, Herman M. Moser, Charles E. Moylan, Joseph Sherbow and John T. Tucker, appointed by Governor O'Conor to fill vacancies until the general election in November, are also candidates; and a committee appointed by the President of the Bar Association is conducting a newspaper and radio campaign in support of the sitting Judges, and soliciting contributions to defray the expenses. The bill prays for a decree declaring (1) that any activity of the Bar Association to promote the nomination or election of a candidate for public office is *ultra vires* and (2) that the activities of the defendants in support of the sitting Judges violates the Maryland Election Law. The bill also prays for an order pending decree to restrain defendants from soliciting or expending money in behalf of the incumbents. Defendants demurred to the bill. On June 11 the Court passed an order denying injunctive relief, and on June 14 passed a decree sustaining the demurrer and dismissing the bill. The appeals are from the order and the decree. . . .

"Appellants strongly urged that a contribution toward the expenses of the special committee of the Bar Association may place the sitting Judges under obligation to the contributor. Undeniably this objection is one of the disadvantages of the elective system. Nevertheless it is axiomatic that those who select the Judges ought to possess information as to the qualifications of those eligible for choice. Consequently it has been customary for the Bar Associations in many cities of the country to urge the election of qualified judicial candidates, in the press and by radio. The Association of the Bar of the City of New York has had an active Judiciary Committee since 1898 to support the candidates considered best fitted for the bench. In 1930 the American Judicature Society reported that notable campaigns against "intolerable" conditions had been conducted by the Bar Associations in Cleveland, St. Louis, and Los Angeles; and in one campaign the Chicago Bar Association had collected and spent more than $75,000 for expenses. (14 *Journal American Judicature Society*, pages 10, 11). . . .

"Appellants also made the objection that the sitting judge policy amounts in actual practice to a device by which the Governor, who has the power to fill vacancies, is enabled to keep his appointees in office, and hence the influence of the Bar Association circumvents the right of the people to elect their judges. However, the fact that all six of the sitting judges are members of the Governor's political party is a matter over which the Court has no control. The situation was well explained by Chief Justice Taft when he declared before the American Bar Association: 'It is true that politics have played a part when judges have been appointed. They have naturally been taken from the lawyers of the prevailing party. The President or Governor appointing them has been elected on a partisan ticket, is the titular head of his party, and is expected to give preferment to those who supported him. This has not, however, resulted in political Courts, because the control of the government has naturally changed from one party to another in the course of a generation, and has normally brought to the bench judges selected from both parties; and then, if the judges are made independent by the character of their tenure, the continued exercise of the judicial function entirely neutralizes in them any possible partisan tendency arising from the nature of their appointments.' (38 A.B.A. Rep. 423).

"We come now to the second question, whether the activities alleged in the bill of complaint violate our Election Law. The Section alleged to be violated declares that it shall be unlawful and shall be deemed a corrupt practice for any corporation 'directly or indirectly', by itself, or through any officer, agent, or employee, representative, or other person whatsoever, to give, contribute, furnish, lend, or promise any money, property, transportation, means or aid to any political party, or any candidate for public office, or for nomination thereto, or to any political organization, or to any

political committee, or to any treasurer or political agent, as herein defined, either directly or indirectly, to aid, promote or influence the success or defeat of any political party or principal, or of any measure or proposition submitted to a vote at a public election or a primary election in this State, or to aid, promote or influence in any manner the election or defeat of a candidate therein, or to be used, applied or expended in any way whatever for political purposes. (Acts of 1945, ch. 934, sec. 157) . . . .

"For more than twenty-five years the administrative officials of the State have construed this Section to the effect that a corporation may lawfully express its views on any candidate for office or any measure to be voted upon by the people. In 1934, when the Baltimore Bar Association endorsed three candidates, two of whom were Republicans, and one a Democrat, the Attorney General of Maryland ruled that a committee of the Association could actively support the candidates if it complied with the provisions regulating political committees. The Bar committee is subject to these provisions whenever its activities come within the definition prescribed by the Act for that term. If the Bar committees were exempt, the Act could be nullified by the incorporation of groups seeking to influence political action but wishing to conceal their financial operations carried on in furtherance of that purpose . . . .

"The law provides that the names of all candidates for judges shall be placed on the ballots or voting machines without any party label or other distinguishing mark or location which might indicate the party affiliation of any such candidate. A candidate for Judge may now file for nomination by more than one political party. Also, no certification of candidacy for nomination shall be accepted unless the candidate is affiliated with the political party whose nomination he seeks does not apply to nominations made at primary elections for the office of judge. It can now be said that the public policy of the State is to keep partisanship out of the elections of judges as far as possible, and to retain in the judiciary those judges who have demonstrated their integrity, wisdom, and sound legal knowledge.

"For these reasons we reached the conclusions (1) that the activities of the Bar Association in behalf of the sitting judges are within the scope of its corporate power; and (2) that these activities do not violate the Election Law of the State. We have therefore affirmed the order and the decree."

A. J. O'CONNOR
President, Washington State Bar Association

Washington State Bar Association

The Washington State Bar Association's annual meeting was held this year in Spokane on August 30 and 31 under the presidency of Fred D. Metzger of Tacoma. The President of the Association for the coming year is A. J. O'Connor of Wenatchee, whose election was announced at the banquet which closed the meeting.

Simultaneously with the Bar Association meeting the Superior Court Judges' Association held its annual meeting with Honorable John A. Frater of Seattle as President. Honorable Timothy A. Paul of Walla Walla, who was elected President of the judges' association for the ensuing year, addressed the Bar Association at the banquet upon the two subjects of the growth and development of the judicial office in this State and the proposed new statute creating a State-wide juvenile court system. Judge Paul made plain his reasons for opposition to the juvenile court proposal.

Honorable A. Reginald MacDougall of Vancouver, B. C., guest of honor at the Bar meeting, addressed a joint meeting of the two associations upon international cooperation and international law, taking for his text the life and international law writings of Hugo Grotius.

Tracy E. Griffin of Seattle presented a memorial on the late Honorable R. L. Maitland of Vancouver, B. C., Attorney General of British Columbia, a leader of the Canadian Bar, and an honorary member of the Washington State Bar Association.

Robin V. Welts, of Mount Vernon, the association's delegate to the American Bar Association, reported on the mid-year meeting of the House of Delegates and urged greater membership in and support of the American Bar Association.

Henry Elliott, of Seattle, as chairman of the committee on selection of judges, presented a report advocating that this State adopt the American Bar Association plan for selection and tenure of judges. This plan would require a constitutional amendment. The convention voted unanimously to go on record as favoring the proposed plan.

The convention adopted resolutions as follows:

(1) Endorsing the new revised code of Washington, as prepared by the statutory code committee, and recommending its enactment by the 1947 session of the legislature.

(2) Recommending to the State Supreme Court that the Bar (now integrated by statute) be integrated by rule of court and that attorneys from other States applying for admission to practice law in this State be required, in addition to present requirements, to take and pass an examination on

their professional qualifications.

(3) Approving in principle the Jennings Bill (Introduced in the 79th Congress, 2d Session, as House Resolution No. 6345), which provides that the venue of an action for personal injuries to employees of interstate railroads shall be only the district of the plaintiff's residence or that in which the cause of action arose.

(4) Recommending the increase of State Bar Association dues to $10.00 annually.

(5) Requesting the 1947 legislature to create a qualified commission to investigate the present status of jurisdiction, procedure and practice in the justice of the peace courts and to report necessary legislation relative thereto to the 1949 session of the legislature.

Oregon State Bar

The Oregon State Bar held the largest convention in its history at Eugene, on September 7, 8 and 9 with more than 400 members in attendance. Many important committee reports were considered, and a schedule of minimum fees revised to conform to current economic conditions was approved. A panel discussion of law office management and computation of fees, led by representatives of both a large firm and a small firm, developed much interest and provoked considerable discussion.

Speakers included Honorable Wiley B. Rutledge, Associate Justice, United States Supreme Court, whose address was entitled "This Business of Judging"; George E. Brand of Detroit, Michigan, President of the American Judicature Society, who spoke on the development and responsibilities of the integrated Bar; Robert M. Alton, chairman of the Trust Section of the American Bankers Association and Vice President of the United States National Bank of Portland, whose very informative address was entitled "Some Practical Remarks About Trust Clauses", and Major Robert M. Kerr, a member of the Oregon State Bar, who prosecuted General Yamashita and who discussed the legal aspects of that trial.

Hugh L. Barzee of Portland and Bryan Goodenough of Salem, newly elected President and Vice President respectively, were introduced. Arthur H. Lewis of Portland and F. M. Sercombe of Portland were re-elected to their respective offices of Treasurer and Secretary.

Its second school of review in law was launched on October 28 by the Oregon State Bar. Nicholas Jaureguy is chairman of the committee in charge. The school is open to all members of the Oregon State Bar and to those who are not yet members but have substantially completed their legal education and expect soon to be applicants for admission to the Bar. If there is sufficient demand, a request will be made to the Supreme Court for a special Bar examination.

The faculty for the courses consists of twenty-two instructors. They are conducting comprehensive refresher courses and explaining the developments in the law during the past five years. Special emphasis is being placed on Oregon rules and decisions.

Vermont Bar Association

The 69th annual meeting of the Vermont Bar Association was held in Montpelier, October 1 and 2. There was a large attendance at all the meetings, especially at the dinner at which Hon. Carl B. Rix, President-Nominee of the American Bar Association, spoke on the lawyer's duty to study and to inform others about the world situation and the work of The United Nations. These are critical years, Mr. Rix said, and the ideologies of democracy, state socialism and communism are in a life-and-death conflict.

The retiring President of the Vermont Bar, Col. Paul A. Chase, of Ludlow, also spoke about the necessity of maintaining our military strength until The United Nations Organization becomes strong enough to carry the job of maintaining peace.

Sherman R. Moulton, Chief Justice of Vermont, reported on the work of the American Law Institute.

Ugo Carusi, U. S. Commissioner of Immigration and Naturalization, gave an interesting address at a public session in the State House, on "The Displaced Peoples of Europe". He narrated many personal experiences of his visit to Europe.

Two moving memorial addresses were given, one on former U. S. District Judge Harland B. Howe, by Arthur L. Graves, and the other on Major General Leonard F. Wing, by Judge George F. Jones.

The usual committee reports were received and a large number of attorneys were admitted to membership. The present membership is 362.

Harold C. Sylvester, of St. Albans, was elected president; Harrison J. Conant, Montpelier, Secretary, and Webster E. Miller, Montpelier, Treasurer.

State Bar Association of Wisconsin

A committee to file a brief with the Supreme Court of Wisconsin favoring an integrated Bar for that State was appointed by the State Bar Association of Wisconsin. The hearing before the Supreme Court was held on September 9 at which time both sides of the integrated Bar controversy were argued. Since the present voluntary Association has for ten years or more been fostering an integrated Bar in Wisconsin, the Association declined at its June meeting to pay for the printing also of a brief opposing integration. The opposition was presented independently of the Association. The Court has not yet decided the matter.

Canadian-American Cooperation for International Law

The proffered cooperation of the Canadian and American Bar Associations with The United Nations, in furtherance of "the progressive development of international law" and its statement or "codification" (Charter, Article 13, Par. 1), was gotten well under way at an all-day conference held on October 9 at The Hotel Plaza, New York City, under the auspices of the American Bar Association's Special Committee, with Chief Justice J. C. McRuer, President of the Canadian Bar Association, and other representatives of its Committee in attendance.

Present from The Secretariat of The United Nations were Dr. Ivan Kerno, Assistant Secretary General and head of the Law Section; Abraham H. Feller, Assistant Secretary-General and Counsel; Dr. L. Y. Liang, head of the Secretary-General's Legal Section on the Codification of International Law; and Wellington Koo, Jr., his assistant. Among those present were also Maurice E. Bathurst, legal adviser to the British delegate to the Security Council; J. A. Ingram, representing Charles Fahy, Legal Adviser to the American Department of State; Arthur A. Ballantine and George A. Finch, of the Carnegie Endowment; W. S. Culbertson, President of the American Branch of the International Law Association; Pittman Potter, Managing Editor of the *American Journal of International Law;* President Willis Smith and Messrs. William L. Ransom, Carl B. Rix, Reginald Heber Smith, and Charles W. Tillett of the American Bar Association Committee; Judge Manley O. Hudson, who has acted for the Committee in consultations abroad, Dr. Louis Sohn, of Harvard Law School; Eugene C. Gerhart, of the Junior Bar. Chairman Ransom of the American Committee presided.

The need for the preparatory activity and cooperation of non-governmental professional and scholarly organizations in the field was recognized. The difficulties which may be encountered in National attitudes, from the experience in previous international conferences, were canvassed. Practicable means of aiding the General Assembly in carrying forward the project entrusted to it by the Charter were explored. A consensus resulted from the discussions.

There was agreement that the subject had been substantially advanced by the deliberations. The American and Canadian Committees are reporting to their respective organizations.

The Canadian Bar Association at its Annual Meeting in Winnipeg, Manitoba, on August 29, voted that its Special Committee shall continue the cooperation with the American Bar Association's Special Committee which was so effective in 1944-45 as to the World Court and improving the Statute of the Court. In 1946-47, the cooperative efforts of the two great Bar Associations will be directed especially to the statement or codification, and the strengthening, of international law.

The Resolutions adopted by the Canadian Bar Association included a declaration as follows:

> That the Canadian Bar Association declares its desire and readiness to be of whatever assistance it can to the agency empowered by the General Assembly for the purpose of dealing with the question of the codification of International Law.

The distinguished Chairman of the Canadian Committee, who retired in August as the President of the Canadian Association, was present, with Mrs. Williams, at the American Bar Association's Annual Meeting in Atlantic City on October 28-November 1, and conferred with the officers and Committee of the latter Association as to the effective means of joint action for the common objectives.

The following were elected by the Canadian Association as the members of its Committee for the ensuing year:

E. K. Williams, K.C. (Chairman)
500 Huron & Erie Building, Winnipeg.

A. W. Rogers, K.C. (Secretary)
320 Bay Street, Toronto.

G. E. Aikins, K. C.
941 Somerset Building, Winnipeg.

L. E. Beaulieu, K.C.
Montreal Trust Building, Montreal.

Honourable F. P. Brais, C.B.E., K.C., LL.D.,
360 St. James Street, W., Montreal.

Honourable W. B. Parris
Law Courts, Vancouver.

O. H. Montgomery, K.C.
1700 Royal Bank Building, Montreal.

D. L. McCarthy, K.C.
38 King Street, W., Toronto.

Honourable C. C. McLaurin
Law Courts, Calgary.

Isaac Pitblado, K.C.
900 Hamilton Building, Winnipeg.

J. McG. Stewart, K.C.
319 Roy Building, Halifax.

Andre Taschereau, K.C.
Price House, Quebec.

G. F. Curtis
University of British Columbia, Vancouver.

C. J. Burchell, K.C.
Chronicle Building, Halifax.

Honourable Chief Justice McRuer (President) (ex officio)
Osgoode Hall, Toronto

J. T. Hackett, K.C. (Dominion Vice-President) (ex officio)
507 Place d' Armes, Montreal.

The members of the American Bar Association's Committee for the year ended with the adjournment of the Atlantic City meeting were:

William L. Ransom, Chairman
33 Pine Street, New York 5, N. Y.

Frederic M. Miller, Vice-Chairman
State House, Des Moines 19, Iowa

Reginald Heber Smith, Secretary
60 State Street, Boston 9, Mass.

Frank E. Holman
Seattle 4, Wash.

Orie L. Phillips
Denver 1, Colo.

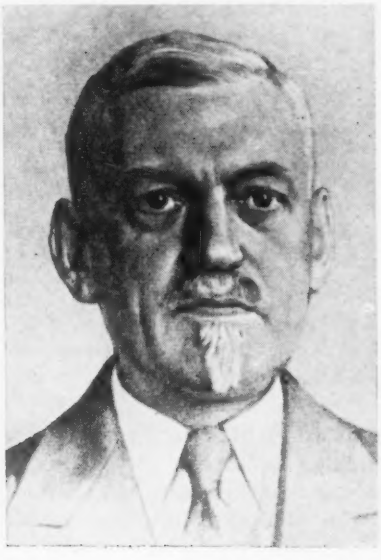
Carl B. Rix
Milwaukee 2, Wis.

James L. Shepherd, Jr.
Houston 2, Texas

M. C. Sloss
San Francisco 4, Calif.

Charles W. Tillett
Charlotte 2, N. C.

HON. CHIEF JUSTICE McRUER



E. K. WILLIAMS, K.C.

It is planned that all resources of the Association, including the Section of International and Comparative Law and the other Sections and Committees which can make contributions on special subjects to be dealt with in various parts of the projected statement or codification, will be mobilized and utilized, under the direction of the Incoming President and the Special Committee appointed by him for the new Association year, in carrying forward the work in cooperation with the Canadian Committee.

History Repeats Itself as to Laws and Regulations?

In a letter which Thomas Paine wrote on May 6, 1793, during his stay in France, to Georges Jacques Danton, which Fritz von Opel brought to the attention of the New York *Times* on October 10, the noted author, inventor, and political leader of Revolutionary fame said:

"I see also another embarrassing circumstance arising in Paris of which we had full experience in America. I mean that of fixing the price of provisions. But if this measure is to be attempted it ought to be done by the municipality. The Convention has nothing to do with regulations of this kind; neither can they be carried into practice. The people of Paris may say they will not give more than a certain price for provisions, but as they cannot compel the country people to bring provisions to market the consequence will be directly contrary to their expectations, and they will find dearness and famine instead of plenty and cheapness. They may force the price down upon the stock in hand, but after that the market will be empty.

"I will give you an example. In Philadelphia we undertook, among other regulations of this kind, to regulate the price of salt; the consequence was that no salt was brought to market, and the price rose to thirty-six shillings sterling per bushel; and we regulated the price of flour (farina) till there was none in the market, and the people were glad to procure it at any price."

Significance of the Senate Action for International Justice Through Law

by Wayne Morse
UNITED STATES SENATOR, OREGON

On August 2, the United States Senate by a vote of 60 to 2 adopted S. Res. 196 with amendments. This Resolution in accordance with the advice-and-consent treaty-making provisions of the Constitution authorized The President to deposit with the Secretary General of The United Nations a Declaration under Paragraph 2 of Article 36 of the Statute of the International Court of Justice, recognizing as compulsory, *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of that Court in all future legal disputes arising in the field of international law.

As the author of S. Res. 196, the writer wishes to express his deep appreciation to the American Bar Association for its sustained and effective support of the Resolution.

The proposal that the United States should accept the compulsory jurisdiction of the World Court, in accordance with the terms and conditions of S. Res. 196 was first made by me during the Senate debates on the San Francisco Charter in July of 1945. The Resolution introduced at that time was known as S. Res. 160. Subsequently, when reintroduced on November 28, 1945, it became known as S. Res. 196. From the time the Resolution for compulsory jurisdiction was introduced in July of 1945, to the time when it was finally passed on August 2, 1946, the American Bar Association, through its officials and appropriate Committees, rendered great service in furthering the cause of the Resolution in the Senate of the United States.

Senator Wayne Morse interrupted his Oregon vacation to write for us a stirring story of the climactic fight in the Senate for favorable action on his S. Res. 196 as to the World Court. In it he repeatedly pays tribute to the decisive help given by the Association and by its JOURNAL *through editorials and informative articles. He quotes from his own argument in the Senate against the Connally Amendment reserving to the United States the right to make its own determination as to whether a dispute involves a "domestic issue", but states his reasons for not regarding the Amendment as emasculating the Declaration. His article is a vivid and important chronicle in the record of the ceaseless struggle of men to establish peace, justice and law, and the judicial process, in the place of force as arbiter between Nations. Irrespective of what individual lawyers may think of his views on other questions, the junior Senator from Oregon deserves the accolade of the Association for his able and victorious efforts for the World Court.*

The Association's Support of the Resolution

During that period of time, a series of excellent editorials on the Resolution was published in the AMERICAN BAR ASSOCIATION JOURNAL, along with a series of leading articles on the general subject of the importance of the Resolution to the establishment of a system of international justice through law. These many contributions on the subject, published from July of 1945 to August of 1946, were referred to extensively in a series of debates on the Resolution in the Senate of the United States.

As the author of the Resolution and as one of the participants in all of the debates on the Resolution in the Senate during the year in which the Resolution was pending before the Senate, the writer has no hesitancy in saying that without the support which he received from the American Bar Association the Resolution would never have reached a victorious vote on August 2.

Significance of the Senate Victory

We are still too close to that very significant Senate victory to fully appreciate all of its great significances and implications. Only history will be able to accord its true meaning and effects upon world peace. However, one cannot read the debates that were waged on S. Res. 196 without recognizing that a great advance was made by the Senate, not only in effectuating the aims and objectives of the San Francisco Charter and Statute, but also in recognizing that we are, in fact, liv-

ing in a One World.

By approving S. Res. 196 as amended, by such an overwhelming vote of 60 to 2, the Senate refused to place the dead hand of the dead point of view of "isolationism" upon the future generations of American boys and girls. There were times during the months from July of 1945 to August 2, 1946, when it looked as though some of the nationalistic ghosts of the 1920s would once again stalk the floor of the Senate. The old, bewhiskered argument: "Now is not the time for the United States to accept the compulsory jurisdiction of the World Court", was advanced against the Resolution, behind the scenes and in Committee room. However, the proponents of the Resolution, supported by the outstanding American authorities in the field of international law and by a very large number of organizations such as the American Bar Association, were determined that the issue should be discussed in the full light of Senate debate and voted upon before the 79th Congress adjourned.

The Vigorous Fight for Action

In spite of the many parliamentary delays and obstacles which were thrown in the path of S. Res. 196 during the year it was pending before the Senate, its proponents never for a day lost sight of their ultimate objective. Periodically carefully prepared speeches in support of the Resolution were delivered on the floor of the Senate, and in those speeches the Foreign Relations Committee was called upon to proceed with hearings on the Resolution and to report it to the Senate for debate and vote.

The determined insistence of the proponents of the Resolution, and of the many organizations in support of their stand, that hearings on the Resolution should be held by at least a subcommittee of the Foreign Relations Committee if not by the full committee, finally led to the holding of such hearings on July 11, 12 and 15, 1946.

The Hearings on the Resolution

The testimony and evidence submitted at these hearings were of such high excellence that it soon became clear to all interested parties that the case in support of the Resolution was an unanswerable one. It also was clear that if the Resolution could be voted out of Committee and placed before the Senate for debate and vote it was bound to pass. Therefore, those Senators who were sponsoring the Resolution came to recognize that one of their major tasks, in attaining Senate approval of the Resolution, had become a parliamentary one of getting the Resolution before the Senate for consideration.

At the hearings held on July 11, 12 and 15, testimony in support of the Resolution was presented by its author and by the following: Dean Acheson, Acting Secretary of State; Charles Fahy, Legal Adviser to the State Department; John G. Buchanan, President of the Pennsylvania Bar Association, and a designated representative of the American Bar Association; George A. Finch, Vice President of the American Society of International Law and Editor-in-Chief of the *American Journal of International Law;* Dr. Phillip C. Jessup, Professor of International Law, Columbia University; Mrs. Esther Holmes Jones, Executive Committee Member, Friends Committee on National Legislation; Orie L. Phillips, Judge of the United States Court of Appeals for the tenth Circuit, member of the American Bar Association's special Committee on the subject; Pitman B. Potter, Secretary of the American Society of International Law and Professor of International Law at American University; Dr. Lawrence Preuss, Professor of Political Science, University of Michigan; Dr. Helen Dwight Reid, American Association of University Women and former Professor of International Law; Willis Smith, of North Carolina, President of the American Bar Association; Raymond Swing, representing Americans United for World Government, Inc.; Edgar Turlington, Chairman of the Section of International and Comparative Law of the American Bar Association; Charles W. Tillett, of North Carolina, a member of the American Bar Association's Special Committee to Report on Proposals for International Organization for Peace and Law; Robert G. Wilson, Consultant, Americans United for World Government, Inc., presenting a statement from Manley O. Hudson, Professor of International Law at Harvard University and judge of the Permanent Court of International Justice; and Lester H. Woolsey, Vice President of the American Society of International Law. In some instances witnesses who could not attend the hearing in person filed very scholarly statements in support of the Resolution.

Organizations Supporting the Resolution

It is interesting to note in passing that the following organizations were represented by the witnesses who testified before the sub-committee:

- American Bar Association
- American Society of International Law
- American Association of University Women
- General Federation of Women's Clubs
- Young Women's Christian Association
- Americans United for World Government
- Friends Committee on National Legislation
- National League of Women Voters
- Federal Bar Association
- Women's Action Committee for Lasting Peace
- Federal Council of the Churches of Christ in America
- Catholic Association for International Peace
- Pennsylvania Bar Association
- National Council of Jewish Women
- National Education Association

Impressive Nature of the Testimony

All the witnesses who appeared were

enthusiastically in favor of the acceptance, on the part of the United States, of the jurisdiction of the International Court of Justice with respect to legal disputes. As the Committee said in its excellent report: "The general feeling seemed to be that such a step taken now by the United States would be a natural and logical sequel to our entry into the United Nations."

Not a single voice was raised in these public hearings against S. Res. 196. It is indeed a very rare thing, in fact an almost "believe-it-or-not" phenomenon to have any major Senate proposal run the gauntlet of a public hearing without at least someone appearing in opposition to it.

Objections Urged Against Action

Following the public hearings, the subcommittee reported its findings to the Senate Foreign Relations Committee on July 17 and July 24. It is no secret that there were those in the Senate, both on and off the Senate Foreign Relations Committee, who did not favor bringing the Resolution before the Senate for debate and vote in the 79th Session of Congress.

In addition to the stock argument, which has been used in the Senate of the United States since 1920 in opposition to acceptance of the compulsory jurisdiction of the World Court, that "Now is not the time to bind the United States to the obligatory jurisdiction of the Court", some new objections were raised, both in Committee and in the cloakrooms, to Senate action on the Resolution in the closing days of the 79th Congress. It was argued that pressing for action on the Resolution might stir up a bitter debate in the Senate on international affairs, which would prove embarrassing to the Secretary of State and his advisers, then seated at the international peace table in Paris.

It was argued further that it would take at least two weeks to complete the debate on the Resolution and that such a period of time would carry the Senate far beyond its scheduled time for adjournment on August 3. It was also suggested that a considerable number of amendments would be offered to the Resolution, in the form of reservations, which in all probability would pass and which if passed would cut the heart out of the Resolution.

Pleas for Delay in Voting

Thus the proponents of the Resolution, on and off of the Foreign Relations Committee, were urged to agree to let the Resolution go over for debate and vote until the convening of the 80th session of the Congress. But they refused to accept any proposal which sought to delay and postpone final action by the 79th Congress. The proponents of the resolution took the position that the attitude of the Senate on S. Res. 196 was a very important operative fact in the field of international relations, knowledge of which should be available to the representatives of all nations seated at the Paris Peace Conference.

The author of the Resolution, in refusing to enter into any agreement for postponing consideration, insisted that we could not hope to establish peaceful procedures and judicial processes for the settlement of legal disputes between and among the Nations by making speeches in favor of such objectives and at the same time throwing up parliamentary barricades in the Senate to immediate action on S. Res. 196. He insisted that we could demonstrate to the other Nations of the world our determination to square our professings with our practices on that subject by the specific act of approving S. Res. 196.

Threat of Emasculating Amendments

The proponents of the Resolution also took the position that the time to meet any emasculating amendments to the Resolution had arrived because, as they put it: "The time has come to find out whether or not the United States Government, insofar as the Senate of the United States is concerned, is ready to live up to the moral obligation so clearly crystallized in the Resolution passed at the San Francisco Conference", when that Conference recommended to the members of the United Nations "that as soon as possible they make declarations recognizing the obligatory jurisdiction of the International Court of Justice according to the provisions of Article 36 of the Statute."

Some day the dramatic story of the contest—most of it behind the scenes—which was waged in the Senate of the United States from July 17, 1946, to August 1, 1946, between those Senators who sought to prevent final action on the Resolution by the 79th Congress and the proponents of the Resolution, can be told. Suffice for this writing it is of interest only to point out that the controversy developed its features of parliamentary tactics as well as its differences between and among Senators over the merits of the substance of the Resolution.

Unanimous Report to the Senate

On July 24, following a full discussion of the findings of the subcommittee, the Senate Foreign Relations Committee, by unanimous consent of those in attendance at the meeting, voted to report the Resolution to the Senate for favorable action. On July 25 the very able Chairman of the subcommittee, Senator Elbert D. Thomas, of Utah, submitted the Committee's excellent printed report to the Senate.

Great credit is due Senator Thomas for the leadership and statesmanship which he displayed in carrying the Resolution over many parliamentary obstacles that were placed in his way, before he was finally able to file the Committee's report with the Senate on July 25.

Time Element Becomes Serious

However, that date was a very late date in the session of the 79th Congress, because it was the general understanding within the Senate that the 79th Congress would adjourn on Friday, August 2. Many other pieces of major legislation had priority status on the Majority Leader's

Calendar. It was generally agreed, even among the proponents of S. Res. 196, that the chances were very slim indeed that the Resolution would be brought into a parliamentary position so that it could become the pending business of the Senate before adjournment on August 2.

It was at this point in the history of the Resolution that many leaders in this Nation, outside of the Senate, including representatives of the organizations such as the American Bar Association, who had appeared at the public hearings in support of the Resolution, went into action. In keeping with all the proprieties, they made known to their elected officials in the Senate their views as to the importance of S. Res. 196 to the foreign relations policies of the United States Government.

Issue as to Action Is Joined

With such support behind him, the author of the Resolution on August 1 took advantage of the parliamentary situation which developed in the Senate and moved: "That the Senate proceed with the immediate consideration of S. Res. 196." Once the motion was made and it was declared by the President *pro tem* of the Senate to be in order, the issue was clearly drawn as to whether or not the Senate would adopt the Resolution, would lay it on the table, would defeat it, or would let it fail for want of a quorum.

All attempts—and there were many—to secure a withdrawal of the motion failed, and on August 2 the debate commenced in dead earnest.

The Connally Amendment Is Offered

The first amendment to the Resolution which was proposed was the so-called Connally Amendment. One of the provisions of S. Res. 196 was "That such declaration should not apply to . . . b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States".

Mr. Connally, the distinguished senior Senator from Texas and Chairman of the Foreign Relations Committee of the Senate, proposed to add to that limitation the following words: "as determined by the United States". A thorough debate on the amendment was held, with the result that the Connally Amendment was finally adopted, by a vote of 51 to 12.

Misapprehensions as to This Amendment

Unfortunately a great deal of misinformation has been published in the press of the country as to the effects and significance of the Connally Amendment. In many stories it has been represented that the Connally amendment vitiates the entire Resolution and destroys any effective jurisdiction of the World Court over disputes involving the United States. It is said by such critics that all the United States has to do in any case, even though the issue involved is one of international law, is to but declare it to be a domestic issue and thereby deprive the World Court of any jurisdiction over the case.

Such an interpretation of the Connally Amendment is both unrealistic, from the standpoint of the practicalities of the situation, and unsound as a matter of interpretation of The United Nations Charter.

Analysis of Provisions of the Charter

It should be remembered that Article 2, Section 7, of the Charter deprives The United Nations of any jurisdiction to intervene in matters which are essentially within the jurisdiction of any state. Thus the Section reads:

> Nothing contained in the present Charter shall authorize The United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

It should also be noted that Article 94 of the Charter reads:

> 1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Significance of Article 94 of the Charter

Thus, as was pointed out in the debate on the Connally Amendment by several Senators, including that very able international lawyer who is now the representative of the United States on the Security Council, Mr. Warren Austin, the Senator from Vermont,

(Continued on page 812)

UNITED STATES SENATE

September 12, 1946

Mr. Willis Smith, President
American Bar Association
Security Bank Building
Raleigh, N. C.

Dear Mr. Smith:

As the author of Senate Resolution 196 providing for the acceptance of the compulsory jurisdiction of the World Court by the United States, I want to thank you most sincerely for the assistance which I received from you and the other members of the American Bar Association, as well as the officials of the *American Bar Association Journal*. The assistance extended by you and your organization to me during the period July 1945 to July 1946 when I pressed for action in the Senate of the United States on the resolution, was very much appreciated.

I am convinced that without this support, my fight for adoption of the Resolution would have failed in the Senate. I think there is no doubt about the fact that the articles and editorials which appeared in the *American Bar Association Journal* in support of my resolution and which I used extensively in my speeches and debates on the floor, influenced a great many Senators to give active support to my resolution.

I am sorry that I am not going to be able to attend the meeting of the American Bar Association this year, because I would like to thank the Association personally for the great contribution that the Association made in helping secure the passage of my World Court Resolution. However, I shall be in Europe at the time the Convention meets.

With kindest personal regards,

Sincerely,

WAYNE MORSE

Courts, Departments and Agencies

E. J. Dimock . . *Editor-in-Charge*

Labor law. . incidental report on usefulness of fact-finding boards. . separation of functions deprecated.

■ The Fact Finding Board appointed by order of the Secretary of Labor, dated August 7, 1946, in the dispute between The Milwaukee Gas Light Company and Local 18, United Gas, Coke and Chemical workers of America (CIO), transmitted to the Secretary, under date of September 14, 1946, a report of a settlement reached by the parties in the course of the Board's proceedings. The report is notable for its observations on the functioning of the fact-finding process in labor disputes. It is stated that the procedure of fact finding and recommendations by a properly qualified governmental board, in the opinion of the writers of the report, holds much promise of filling the long-felt want of a process for arriving at, as distinguished from interpreting, collective bargaining agreements. A plea is made, however, for the abandonment of the practice of having the facts found by one board and the recommendation made by another. In the instant case the parties had agreed upon such dual procedure but, during the course of the proceedings, had changed it so that this one board was given both functions.

Office of Economic Stabilization. . Supplementary Wage and Salary Regulations. . CFR, Tit. 32, Chap. XVIII, Part 4001, Sec. 205. . new section permits increase of government wages to prevailing rate without approval by Wage Stabilization Board.

■ On September 12, 1946, Stabilization Director John R. Steelman added to the Supplementary Wage and Salary Regulations of the Office of Economic Stabilization (CFR, Tit. 32, Chap. XVIII, Part 4001) Section 205 permitting government agencies to pay wages comparable to those paid for comparable services by other operators in the same industry provided the government operations constitute less than half the total operations of the industry and the part of the remaining operations which is paying the comparable wages is substantial. Provisions of the regulations inconsistent with the making of wage increases otherwise permitted by the new section were expressly superseded.

The immediate effect of the amendment was to permit the settlement of a strike of maritime workers by the payment of a wage scale higher than that approved by the Wage Stabilization Board. Both the Maritime Commission and the private operators had agreed to this higher wage scale and, since the private operators were willing to absorb the increase, approval by the Board would have been unnecessary if employment by the Maritime Commission had not also been involved. The amendment eliminated the necessity for Board approval of the increase in wages paid by the Maritime Commission.

War Mobilization and Reconversion Act. . provision against making production dependent upon "functioning" at a given time forbids use of "historical basis" in allocation of grain to distillers.

■ On September 23, 1946, Schweinhaut, J., of the District of Columbia District Court, in the case of *Publicker Industries, Inc.*, v. *Anderson, Secretary of Agriculture,* temporarily enjoined the Secretary from using the "historical basis" for the allocation of grain to distillers. He held that its application to plaintiff would cause injury since plaintiff's quota would have been much greater had it been ignored. He further found that such application would be violative of § 203 (b) of the War Mobilization and Reconversion Act (50 U.S.C. 1658-1660) providing that production for non-war use shall not be made dependent upon "the functioning of a concern in a given field of activity at a given time".

Federal Register. . Administrative Procedure Act. . material submitted by agencies pursuant to Act published on September 11, 1946, in 955-page supplement.

■ The Federal Register, on September 11, 1946, published the organizational and procedural material submitted pursuant to Section 3 (a) (1) and (2) of the Administrative Procedure Act (Pub. Law 404, 79th Cong.; 60 Stat. 238). The material is presented by Departments in the order of their establishment, followed by independent agencies in alphabetical order. It is doubtful whether anyone visualized in advance the extent of the information and regulations that would thus be made available. It is published in a Part II of the Register for that date and comprised in four sections totaling 955 pages. The publication closes with an index subdivided under the names of the 159 agencies concerned and a table of the various sections of the CFR affected.

Interstate commerce. . validity of state statute requiring separate railroad cars for white and colored interstate passengers. . police officer as agent of railroad in ejecting passenger.

■ On September 23, 1946, in the case of *Matthews* v. *Southern Rail-*

way, the District of Columbia Court of Appeals, in an opinion by Prettyman, J., with Clark, J., dissenting as to the correctness of the charge, applied to railroads the doctrine of *Morgan* v. *Virginia*, decided by the United States Supreme Court on June 3, 1946 (90 L. ed. Adv. Ops. 982; 66 Sup. Ct. Rep. 1050; see 32 A.B.A.J. 585) which had held that a State statute requiring bus line operators to furnish separate accommodations to white and colored passengers was invalid as to interstate passengers. Plaintiffs in the instant case had sought damages for their ejection from a train by a police officer when they refused to move into a different car from the one in which they had reserved seats. A verdict had been returned for the railroad. The Court of Appeals reversed the judgment for the railroad on the ground that the court had erred in instructing the jury that, if it found that the police officer was not acting as agent of the railroad, the verdict must be for the railroad. It was pointed out that, even in the absence of an agency relationship with the police officer, the railroad's employees might have acted in such a way as to render it liable for breach of the contract of carriage or as a joint tort feasor with the police officer.

Know Your Sections:

A Supplement

In our October issue was presented a graphic delineation of the Sections and their great part in the Association's work, followed by an individual account of each Section's specialty. Four Sections were omitted therefrom—Section of Patent, Trade-Mark and Copyright Law, the Section of Taxation, Section of Municipal Law and the Section of Judicial Administration. We publish below the accounts of the Section of Patent, Trade-Mark and Copyright Law and the Section of Taxation. Because of the failure of their officers to furnish the requisite data, we are unable to publish in this issue the accounts of the Sections of Judicial Administration and of Municipal Law.

Section of Patent, Trade-Mark and Copyright Law

This Section is one of the oldest in the Association and was the first to be created to deal with a special branch of the law. It was founded in August of 1894, and so is in its fifty-third year of service to the Patent Bar, the legal profession as a whole, and the public.

Nineteen standing and special committees of the Section this year have considered and acted on many subjects. Their recommendations as contained in their annual reports provided a full agenda for the 1946 meeting of the Section. They are now being distributed to Section membership. In addition to these reports, the Section publishes and distributes each year a summary of its proceedings.

The Section has been active during the past decade in connection with the many proposals for changes in the Patent System. A large number of bills introduced in the Congress have been considered, in relation to patents, trade-marks, and copyrights. The carefully prepared reports on these bills, by one or more committees having nation-wide representation, have been submitted to meetings of the Section and thoroughly discussed and voted upon. Matters of major importance have been referred to and voted on by the entire Section membership.

A large and representative portion of its nearly 1200 members engage in the Section's activities. Over 100 new members have been enrolled during this year. Open to all members of the Association, the yearly dues for Section membership are $2.00.

Typical activities include consideration of matters relating to Patent Law Revision, Patent Office Affairs, Interference Practice, Trade-Marks, and Anti-Trust matters. Members of the Section who participate in its affairs keep up-to-date with current patent, trade-mark and copyright problems of individuals, industry, members of the Bar, Congress, and the Government. The 1946 meeting showed a resumption of normal attendance as well as increased interest.

The Section hailed with satisfaction the recent passage of the Lanham Trade-Mark Bill, signed by President Truman and effective July 5. The Association and the Section have consistently favored this bill. Although it was repeatedly passed by the House, it had never before gained approval in the Senate. It is believed that the new Trade-Mark Act (Public Law No. 489—79th Congress) will strengthen trade-mark rights and be of benefit to individuals, business, and the general public.

Report of the Section of Taxation

The Section of Taxation is in a position to report on several projects which should be of interest to most members of the Bar.

In 1943, the Section, under the direction of the Board of Governors of the Association, instituted a pro-

gram of lecture courses on the Fundamentals of Federal Taxation. These have been conducted by the Practising Law Institute under the auspices of the Section and of the Association, and of many local bar associations, law schools and committees of lawyers in many of the cities of the country. The program met with a very successful response. The courses have been repeated in many cities and the program of education in this field continues. During the past year the instruction pamphlets for an advanced course in Current Problems in Federal Taxation have been completed and lecture courses given in several cities. The experience gained has been used in the refresher courses which are now being held for returned veterans under the sponsorship of the Association.

Resolutions adopted at the last annual meeting, looking to an administration of the principal relief provisions of the Excess Profits Tax Law (Section 722, Internal Revenue Code) in a spirit better calculated to accomplish the expressed purpose of Congress, were presented to the proper authorities and were backed by testimony of the Chairman of the Section and others at hearings before the Joint Congressional Committee on Internal Revenue Taxation. The formal presentation was followed by informal conferences, all of which led to the creation in the Bureau of Internal Revenue of the new Excess Profits Tax Council. Ten of the fifteen members of that Council were appointed from qualified lawyers, accountants and economists not then in the Bureau of Internal Revenue. The Council has been entrusted with full responsibility for the administration of this important provision of the taxing statute.

During the past year the Section approved drafts of uniform statutes in the fields of taxation of real property and of public utilities by the states and their political subdivisions. These model statutes have been referred to the Commissioners on Uniform State Laws for their consideration. This project represents the culmination of several years of effort on the part of the committee of the Section, during which several round-table discussions were held in connection with annual meetings of the Association.

The membership of the Section is at an all-time high, approaching 2,000. Its finances are in excellent shape. It has been possible, during the past year, to furnish the membership of the Section, in addition to the usual reports of the several committees and résumés of the annual meeting, with a detailed outline of the testimony given at the hearings referred to above with respect to the administration of Section 722 of the Internal Revenue Code, and copies of the testimony given by the Commissioner of Internal Revenue in reply, in which the new plan for the creation of the Excess Profits Tax Council was outlined.

The several committees of the Section in the field of federal, state and local taxation continue to consider those matters which appear to be of greatest importance in our field. The Special Committee on Federal Judicial and Administrative Procedure has produced two exhaustive and informative reports, one published in the Advance Program of the Section for last year, and the other in the Program for the current year. The latter report will be one of the matters which will come up for consideration at the annual meeting in October.

The Committee on Coordination of Federal, State and Local Taxes, under the leadership of Commissioner Long of Massachusetts, is presently considering a lengthy and thorough draft of a report in its field, which is still in tentative form. It is doubtful that this report will be sufficiently complete for consideration at the annual meeting in 1946, but certainly will present one of the highlights of the annual meeting in 1947.

Space does not permit a detailed report on the activities of the other committees, but some idea of the breadth of the program may be obtained from a study of the Advance Program of the Section, in which the committee reports are printed.

1947 Meeting of the Association

In these days when hotel accommodations have to be booked long in advance, the Board of Governors on September 8, decided the place and time for the 1947 Annual Meeting.

It will be held in Cleveland, Ohio, during the week of September 22.

The Association last met in Cleveland in 1938. It met there also in 1897 and 1918. The adequacy of hotel accommodations in Cleveland, the spirit and hospitality of the lawyers and people of the City and State, the convenience of the Municipal Auditorium and the accessibility of the Ohio city by train, plane and motor, made it an advisable selection for 1947.

With the 1945 Annual Meeting held in mid-December and the 1946 meeting scheduled for the end of October, it was deemed practicable to move the 1947 meeting forward a month to late September, without disturbing the normal balance of an Association year. By 1947, it is anticipated that the Association can return to a normal meeting-date, in July, August or early September.

To undertake to travel to the West Coast for the 1947 meeting was deemed impracticable. That project was regretfully deferred until 1948 or until hotel and travel conditions have become favorable.

Letters to the Editors

To the Editors:

First and foremost, let me congratulate the JOURNAL . . . . I read the last issue through with the greatest interest. It was replete with valuable matter and can compare favorably with any journal in our land. I am sure that you can do most valuable work, not only for our Bar but for our country in editing this publication which must grow ever more influential and which can confer upon the Bar a solidarity which it has not had in many years past.

I read with interest your editorial "Defense Against Leviathan", and it seems to me that it would certainly be wise to reprint Mr. Palmer's very able article. I think he has stated very cogently and lucidly the main danger of our legal and social institutions of today. For this reason I think Mr. Palmer's article is deserving of the widest circulation.

You are quite right: Lawyers desire leadership and the Association is now in a position to furnish it. With the chaos existing throughout the world today, especially in our own country, and with the great threat to our fundamental institutions, the lawyers must, if our system is to survive, furnish leadership and evince a solidarity which they have not sufficiently manifested in the past.

FREDERIC R. COUDERT

New York, New York

To the Editors:

Your editorial in the August issue, in which you discuss Ben W. Palmer's article in your June issue, is a source of real pleasure to me, and I trust will strike a responsive chord in the minds of many of our members.

Ben W. Palmer is doing a great service, not only to the Bar, but to the entire body politic, in his forceful references to the basic ideas of moral right and wrong, which our courts have suffered to disappear in the welter of decisions directed by them to the protection of property rights, so called. The JOURNAL is to be congratulated on the publicity given to this article.

If there is no sanction beyond the positive civil law for men's actions or omissions, our system of law might well be called perfect. If it leads to totalitarianism, or statism, we have no reason for criticism. If, however, there is a sanction beyond the positive law, there is an obligation on the Bar to acknowledge that fact and to assist in bringing into the civil law recognition of the principles of the natural law, and of their application to the everyday affairs of life, business, and government.

We have built up a necessary storehouse of judicial precedents from which we seek to solve the problems of mankind. That precedents are necessary no one can gainsay. However, an examination into the historical background of some of the precedents on which the success of modern business has arisen, *under the law*, might make us the least bit suspicious of their validity, and doubtful of their ultimate benefit to humanity. "A corrupt tree cannot bring forth good fruit". Age may dignify a principle with authority, but if corrupt in its inception, the corruption remains until the principle is eradicated.

If Mr. Palmer's article can be given a wider circulation than would ordinarily be had through the JOURNAL, you will be doing a great public service by making reprints available. I have already procured extra copies of your June issue, but I will be pleased to order at least fifty copies of the reprint for circulation among friends and acquaintances.

In your November, 1945, issue, you published an article by Mr. Palmer entitled "Hobbes, Holmes and Hitler." To my mind, this study of the tendency of materialistic philosophy to absolutism should be in the hands of every lawyer, and especially in the hands of every reader, who is so fortunate as to have the "Defense Against Leviathan" brought to his attention. May I suggest that reprints of both articles be made? A good project should never be left half finished.

WILLIAM J. GOOD

Boston, Massachusetts

To the Editors:

"The Historian and the Lawyer", in the September JOURNAL, is a superb piece of work; and may I take the liberty to suggest that from now on Mr. Palmer should not spend too much time with "the wrangling courts and stubborn law" (Blackstone) but instead go on with his reading and writing and his historical activities?

WAYNE C. WILLIAMS

Denver, Colorado

To the Editors:

I have been very interested indeed in the articles which have appeared in the AMERICAN BAR ASSOCIATION JOURNAL written by Ben W. Palmer of Minneapolis. I think that they are very scholarly and very fine and it would be an excellent idea to have reprints made by the Association.

MACK V. TRAYNOR

Devil's Lake, North Dakota

To the Editors:

I was much impressed by the article by Ben W. Palmer, and I regard it as so important a matter that reprints would be desirable, if the means and facilities of the Association permit.

IRA JEWEL WILLIAMS

Philadelphia, Pennsylvania

To the Editors:

That men should turn again for refuge to the dogmas of natural law, a trend indicated by your announced favorable reception of Ben Palmer's article (32 A.B.A.J. 328) offers regrettable evidence of man's inability to live what Santayana has happily termed the life of complete disillusion.

We are asked to accept the theory that man, as a rational being (a phrase, not defined), possessed of reason (a term, not defined) is enabled through its exercise to discover self-evident, eternal, universal, changeless principles upon which our law, if it be law at all, is to be modelled. Only such an acceptance, we are told in effect, can save us from Leviathan, i.e., the totalitarian state. At the same time, philosophies and philosophies of law which look to experience as a guide to future endeavor and a criterion of past action are deprecated.

To probe fully the validity of the natural law theory which Mr. Palmer seeks to bless would involve, first, a definition of what he has in mind when he writes of "reason." But be it reason, or really instinct, that he exploits, he sets forth his closed system with the undefined faculty left to operate in a vacuum.

Now, I submit, the absolute *a priori* cannot exist: Every thought of man is based consciously or subconsciously, directly or vicariously upon experience. Alas, however, man must still cling to the fascinating but unverifiable—in this instance, so-called natural law—to his felt truths, his absolutes. But the application of caution is in order lest these supposed truths be in reality a series of multiple Santa Clauses.

As to natural law (assuming its existence) as a bulwark against totalitarianism, this can be so only if natural law is entirely self-evident and antagonistic to Leviathan, for if there be any doubts as to its precepts, these doubts must be reconciled and overcome by an authoritative interpretation and the creation of supposedly competent authority immediately involves the necessity of another restraint (apart from natural law) to dam this authority within limits. Compare the attributes of the natural-law systems of Locke and Hobbes; e.g., as evidence of whether or not these precepts are indeed self-evident.

The name of the great Pound is utilized to give support by innuendo to the natural law theory. Yet a perusal of his prolific works will indicate that he has never accepted the orthodox natural law theory, has, in fact, pointed out the sterility to which it can and has led. Pound himself is the leading exponent, if not indeed the founder in this country, of the sociological school of jurisprudence most of whose tenets are flatly repudiated by his brethren of the natural-law bent.

IRVING JACOBSON

Fort Lewis, Washington

To the Editors:

My attention was attracted to the editorial in the current AMERICAN BAR ASSOCIATION JOURNAL, page 478, wherein you requested the reaction of the readers of the JOURNAL in respect to Mr. Ben Palmer's article, "Defense Against Leviathan".

The undersigned has been an ardent admirer of the craftsmanship of Mr. Palmer as displayed in the monographs published in your valuable periodical. I thought that his article on "Hobbes, Holmes and Hitler" and "Lord Coke" merited the applause of the whole Bar. You will therefore please accept the recommendation of one reader to provide for reprints of Mr. Palmer's article.

HARRY B. BERRY

San Antonio, Texas

To the Editors:

In response to your editorial concerning "Defense Against Leviathan" by Ben W. Palmer, will say that I would like to have twenty-five copies of this article in the event you publish it in pamphlet form.

My attention was first directed to Mr. Palmer in "Hobbes, Holmes and Hitler" (31 A.B.A.J. 569). I liked what he said so well that I clipped the article. His "Defense Against Leviathan" is also very fine. It is delightfully refreshing and good for the soul to know that at least a few men in this generation are interested in the under-currents, the heart of things, the fundamentals.

F. E. WILLIAMS

Judge of the Circuit Court,
St. Louis, Missouri

To the Editors:

I have read with a great deal of interest the article by Ben W. Palmer entitled "Defense Against Leviathan" which appeared in a recent issue of the AMERICAN BAR ASSOCIATION JOURNAL. I urge that the Association reprint this article for further distribution. I would be very much interested in having some additional copies of the article.

RAYMOND N. CAVERLY

New York, New York

To the Editors:

When Mr. Palmer's article appeared in the JOURNAL I not only wrote to him congratulating him upon it, but asked if he could furnish me with ten additional copies, for which I would gladly forward him my check.

In answer to the invitation in your editorial, therefore, I would be glad to subscribe for a reasonable number, at a nominal cost, in the event a reprint is decided upon.

EDWARD MCLAUGHLIN

New York, New York

To the Editors:

Laying aside anything of my own of course, let me congratulate you on a magnificent number of the JOURNAL (for September). Many of my friends have spoken to me about the way in which you are revitalizing and making it a vigorous organ of Association opinion. I was especially pleased with the last number

which I have just received, not only because of its quality but the wide scope and variety of its contents. This is to give the lawyers of America the wider horizons and consciousness of great problems and responsibilities which is essential if they are to assert the leadership which is rightfully theirs.

BEN W. PALMER

Minneapolis, Minnesota

To the Editors:

The passage of the Administrative Procedure Act may bring to the minds of many lawyers the question of the origin or the basis for such an Act. I always thought it was brought about by the constant demand of individuals and business men that the government "do something about it", often referring to problems in business.

What was often done and decided by a board of directors of a local trade association was passed on to the agencies under State and Federal Laws.

When discretion or executive authority is needed in business, can the agencies do the job better than the directors of a trade association? At least there is an appeal to the courts and judicial precedent is established.

It seems to fit in the present economic pattern, and marks an era of different business to be handled by lawyers.

AUGUST J. SPRINGMEIER

St. Louis, Missouri

To the Editors:

I desire another copy of the article in the September JOURNAL entitled "The Historian and the Lawyer", by Ben W. Palmer.

I notice in the editorial in the August issue that the article "Defense Against Leviathan" in the June issue may be reprinted. I should like five copies of this article, also, in the event you reprint it.

I am deeply impressed not only by the thoughtfulness and beauty of statement in these two articles, but also by the breadth of research and reference.

ABRAHAM LOWENHAUPT

St. Louis, Missouri,

To the Editors:

The story which Squire Ransom has written about D. T. Watson in the September issue of the JOURNAL is of excellent quality, having set as its mark the minds of young men returning from the war and reestablishing themselves in law offices or law schools.

In my opinion, the object of his aim was perfectly centered, as will be perceived by all who see it, in *Powell* v. *Pennsylvania*. Mr. Ransom shows that the late Mr. Watson had a truly great legal mind, and I think it to be one of the most interesting short biographies that I have ever read.

The words "Never forget that it is individual cases of violated Constitutional rights which make the aggregate of successful usurpation of power," are equal to any of the historic utterances down to date.

JOHN G. MARSHALL

Auburn, Maine

To the Editors:

May I say a word in the Palmer-Briggs controversy?

They are mostly talking about different things. Law, of course, is the demand of a sovereign and force puts it into effect. But for Briggs to belittle the Declaration of Independence—to talk about majorities—and to forget our constitutional safeguards, is too much to take.

Law itself has many sources, and the ideal of Justice, like other ideals, is at least one of the sources of that force about which Briggs writes—and so, too, is Natural Law. Holmes was not a legal philosopher but a legal historian. He was an intellectual nihilist and, therefore, not fitted to develop a legal philosophy.

Without ideals and their influence on the development of law, we would certainly be on the way back to what would amount to "jungle law".

WALTER H. BUCK

Baltimore, Maryland

To the Editors:

Curious enough I was about to write you a letter of commendation on the JOURNAL when I encountered your editorial request for comment.

As a member of several years standing and also a member of the Insurance Section and the Section of International Law, I wish to thank you for the aliveness of the JOURNAL.

In your work in wholehearted support of UNO, which interests me peculiarly, I believe the JOURNAL to be the most influential of all the publications and organizations, both through its content and number of minds reached

With appreciation.

R. C. NEUENDORFFER

New York

To the Editors:

I have read everything published in the JOURNAL about the Nuremberg trials, and am grateful to the JOURNAL for publishing something on both sides of this controversial question. I wish I could feel the confidence of the JOURNAL that the Tribunal will render a verdict "as the just results of a fair, full trial and as well grounded in law", etc. But I had no intention of criticizing the JOURNAL for its part in the discussion of this important international proceeding. I know of no journal, lay or professional, which has given the subject such fair consideration.

SAMUEL A. HARPER

Cocoa, Florida

Comments on Four Recent Articles in the Journal

by Frank W. Grinnell
OF THE BOSTON BAR, STATE DELEGATE, MASSACHUSETTS

The sound of combat not far away led Frank W. Grinnell to bring out and burnish his lances, to carry them into the midst of several controversies on which the JOURNAL *has been gladly publishing both sides. The doughty historian of legal scholarship delves into the records to give facts which some of the contenders had overlooked. His quotations from the Holmes-Pollock letters are especially apt. On the great issues, "His spear knows no brother".*

The elder Disraeli, if I remember correctly, considered Dryden's "rambling" prefaces the best in the language. The variety in "rambling" has its attractions, and without attempting to step into Dryden's shoes, I submit the following random comments after reading the recent interesting articles in the JOURNAL by Mr. Palmer, on Lord Coke, Hobbes, Holmes and history, and the late Dean Kennedy's polite rejoinder to Judge Frank's caustic remarks about the judicial costume which the judge dignified (or degraded) by the phrase, "The Cult of the Robe". I have also read Judge Frank's article under the title referred to, in the *Saturday Review of Literature* for October 13, 1945.

The Discussion About Robes

First, as to robes: There seems to be a great deal of elaborate theorizing and language used about a simple matter, as well as some misunderstanding of American legal history and Judge Holmes' part in it. I have not the pleasure of Judge Frank's acquaintance, except through his writings, which abound in exceedingly free and caustic language not always graced by the usual professional restraints in expression. At all events, "nonsense" is what I would call his suggestion that a proper formal judicial costume damages the intellectual operations of our judges. The late Dean Kennedy was more philosophical in his extended comment, but appears to have arrived at a conclusion similar to mine.

Now as to the legal history: Judge Frank in his book, *Law and the Modern Mind*, refers to Holmes as the "completely adult jurist". In a much-quoted and very wise sentence during the prohibition era, Judge Holmes said, "effervescent opinions, like the not yet forgotten champagnes, go flat quickest when exposed to the air". In his article referred to, Judge Frank says:

> Robes and . . . court house verbiage symbolize the notion that courts must preserve the ancient ways, that the past is sacred, and change impious.

I wonder whether this somewhat "effervescent" opinion was expressed with knowledge that robes were resumed by the Massachusetts Court, after more than one hundred years of their absence, when Holmes, "the completely adult jurist" was Chief Justice? Dean Kennedy says that Holmes "for fifty years wore judicial robes". This is a mistake. He did not. He became a judge of the Supreme Judicial Court of Massachusetts in 1882, but he never wore a robe until after he became Chief Justice in 1899. Why?

While there is some uncertainty as to the exact date, I think the Massachusetts judges began to wear robes (elaborate ones) when Hutchinson became Chief Justice about 1751, and they wore them both before and after the Revolution, until 1792. Francis Dana was then Chief Justice of the Supreme Judicial Court. The story of what happened was told by his colleague, Honorable Increase Sumner, as reported by his son, William H. Sumner:

> The dress of the Judges before the Revolution, and which was continued by them afterwards, was a black silk gown worn over a full black suit, white bands, and a silk bag for the hair. This was worn by the judges in civil causes, and criminal trials, excepting those for capital offences. In these they wore scarlet robes with black velvet collars, and cuffs to their large sleeves, and black velvet facings to their robes. The dignified appearance of the Judges, in either dress, made an impression upon the public mind of reverence for the authority of the law. The use of the robes was discontinued soon after the appointment of Judge Dawes to the bench (1792). The Judge was a man of small stature, of a most amiable and excellent disposition, somewhat of a poet, but had a slight impediment in his speech which made him lisp. Dana, the Chief Justice, was also of small stature, but had a very impressive and authoritative manner. The Chief Justice took umbrage at this appointment, on account of what he considered the undignified appearance and utterance of Judge Dawes, and alleged that it was not for his qualifications, but by the influence of his father, who was a member of Gov. Hancock's Council, that he was appointed. Soon after Judge Dawes took

his seat upon the bench, the Chief Justice came into Court without his robes, while the side Judges had theirs on. Upon their retiring to the lobby after the adjournment of the Court, Judge Sumner remonstrated with the Chief Justice against *his* undignified appearance without his robes, and said, "If you leave yours off, Chief Justice, we shall ours also; but remember what I say, if people get accustomed to seeing the Judges in a common dress, without their robes, the Court will never be able to resume them." The Chief Justice, with a remark of great asperity, persisted in his determination, and from that period the robes, which gave such dignity to the bench, were laid aside.

The Court sat without robes for more than 100 years, until March 5, 1901, when as a result of a petition from leading members of the Bar when Holmes was Chief Justice, the present costume was adopted of a simple black silk robe.

The late Albert E. Pillsbury, former Attorney General, whose caustic tongue probably prevented his being Governor of Massachusetts, was quoted as saying, when the robes were put on again: "It is desirable that the judges should at least have the appearance of learning."

We expect soldiers, police, court officers, governors, pallbearers, conductors of trains and orchestras, and a good many other persons, male and female, on different occasions, to be suitably dressed. Why not a judge, even the occasional judge who may be a "stuffed shirt" (which most of our judges are not)? Some form of distinctive costume is as old as the human race. Why worry? I suggest also that a simple robe is more becoming for the rest of us to look at, and no more "awe inspiring" to the public, than the dreadful "Prince Albert" frock coats of the late nineteenth century. If any judge *sitting alone* thinks it in the interest of justice to take off his robe, there is nothing to prevent his following the example of Judge Mack (reported by Judge Frank), or of Baron Martin of the English court of Exchequer in the middle of the Nineteenth century:

> On a summer circuit when the weather was very hot, Baron Martin not only took off his wig and robes, but, finding the cushion of his chair too warm, ordered something cooler to put on it, and sat on a soap-box. (See *A Generation of Judges*, by their Reporter; page 94).

Holmes, Pollock and "The Law of Nature" as a "Source of Law"

Turning now to Mr. Palmer's intensely interesting comments on what he finds in the legal philosophy of Judge Holmes—in these days of re-thinking about everything, the views of Holmes call for re-thinking as much as those of anybody else, ancient or modern, from Socrates to Franklin D. Roosevelt, and we are fortunate in having so stimulating and impersonal a provocateur as Mr. Palmer.

In all this discussion the distinction between "law" and "the sources of law", demonstrated by John C. Gray in his *Nature and the Sources of Law*, should be kept in mind. Mr. Palmer's discussion relates to the background or sources, more specifically what he considers the limited sources, recognized by Holmes in his "philosophy of law", as disclosed by his writings. This distinction is apt to be overlooked when "natural law" or the "Law of Nature" as a source of reasoning is referred to. Lord Coke merited all that Mr. Palmer said about him in the JOURNAL for March, 1945; and Holdsworth said of Coke:

> What Shakespeare has been to literature, what Bacon has been to philosophy, what the translators of the authorized version of the Bible have been to religion, Coke has been to the public and private law of England. He was one of those great Elizabethans whose genius and enthusiasm enabled them, as Kipling has finely and truly said in his Elizabethan poem,
>
> "Lightly to build new world, or lightly loose
> Words that shall shake and shape all after time."

He established, or rather revived and made accessible, the "common law" as against the "divine right of Kings" represented by James I and Charles I, which, in turn, was a controversial theory in the earlier conflict with the "divine" right of ecclesiastics in temporal matters.[1] Nevertheless, Coke's legal imagination, in what he told King James was "the artificial reason" of the law, did not reach fully to the equitable reasoning which some of the great judges like Hale and Mansfield considered as part of the "common law" in its broad sense. Fortunately for us, he lost his battle with the Chancellors. As Pollock points out, the equitable reasoning stemmed from the canon and civil "law of nature"; and after the work of More, Ellesmere, Bacon, Nottingham and Hardwicke, it entered the "common law" largely through Lord Mansfield as it entered international law through Grotius and Lord Stowell.[2]

In this connection the apparently wide divergence of views of Judge Holmes and Sir Frederick Pollock about "natural law" or "the law of nature" appears to have escaped the attention which it deserves. In connection with Mr. Palmer's suggestions, readers of the JOURNAL may be interested in a few brief quotations in which Pollock seems to rise higher than Holmes in his conception of the sources of law. Mr. Palmer (on page 332 of the June JOURNAL) quotes from an article by Holmes (32 Harv. L. Rev. 40-44) on "Natural Law", as follows:

> The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what is familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.

In opening the same article Holmes said:

> It is not enough for the knight of romance that you agree that his lady is a very nice girl—if you do not admit that she is the best that God ever made or will make, you must fight. There is in all men a demand for superlative, so much so that the poor devil who has no other way of reaching it attains it by getting drunk. It seems to me that this demand is at the bottom of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law.

These quotations are characteristic, and we can sympathize

1. Figgis, *The Theory of the Divine Right of Kings*, pages 175-6, 226-8, 255.
2. See Holdsworth's *Some Makers of English Law*.

deeply with "the poor devil" who gets inebriated in his reach "for the superlative"; but this yearning "for the superlative of universal validity", which Holmes refers to, is a very different thing from the "Law of Nature" as a system of thinking, which he did not distinguish in his article, with the result that he raised serious questions in the mind of Pollock to whom it was sent. On October 18, 1918, Holmes wrote:

> Dear F. P.
>
> . . . .
>
> I hope in a few days to reciprocate for your verses by sending you a few remarks suggested by reading volume two of Geny, on something or other I forgot what, that leads him to give an account of the views of a lot of modern jurists on Natural Law, etc., in which Geny believes. I don't and have taken the occasion to state a part of my creed. I wrote them as (sic) some years ago a little piece for the "Illinois Law Review" & Wigmore, *currente calamo,* in a kind of rage of writing one day, and Laski when I showed them to him impounded them for the *Harvard Law Review,* which I had not intended . . .

On December 20, 1918, Pollock wrote:

> My dear Holmes:
>
> The *Harvard Law Review* is to hand with your remarks on Natural Law as set forth by Geny. Not knowing what he says I cannot fully appreciate your criticism but if you mean to imply that no one can accept natural law (—natural justice—reason as understood in the Common Law) without maintaining it as a body of rules known to be absolutely true, I do not agree.
>
> See my studies in *Journal of Comparative Legislation* 1900, 1901, of which I think I sent you separate prints at the time.
>
> The Roman lawyers made no such assertions about *ius gentium,* which was simply general custom and for most purposes equivalent to *ius naturale.* As to the exceptional divergences, see opening of the *Institutes.*
>
> In the Middle Ages natural law was regarded as the senior branch of divine law and therefore had to be treated as infallible (but there was no infallible way of knowing what it was).
>
> If you deny that any principles of conduct at all are common to and admitted by all men who try to behave reasonably well, I don't see how you can have any ethics or any ethical background for law.
>
> Apparently the ex-German Emperor will have to be tried by a wholly new jurisdiction, if at all, and by some standard which all medieval and not a few modern doctors would refer to natural law. A committee of which I am a member is now hard at work trying to inform the conscience of the Attorney General at the request of the War Cabinet on this group of problems (there are problems with regard to lesser folk also).
>
> Yours ever,
>
> F. P.

(1 Holmes-Pollock Letters, pages 270-275)

On January 24, 1919, Holmes answered:

> Dear F. P.
>
> Your studies in Natural Law are not forthcoming on a rapid look around. I remember your writing on the subject but I couldn't recite on what you said, although of course I read whatever I know of yours. But I didn't expect you to agree with me altogether. As to Ethics I have called them a body of imperfect social generalizations expressed in terms of emotion. Of course I agree that there is such a body on which to a certain extent civilized men would agree—but how much less than would have been taken for granted fifty years ago, witness the Bolsheviki. John M. Zane walks into me in the *Michigan Law Review* and later in the *Illinois Law Review* and thinks I am hopelessly precluded from the place that otherwise I should occupy by accepting the old notion of a sovereign being superior to the law that he or it makes and by believing that judges make law. I suspect he means a different thing from what I do by law and that the fight is more about words than he thinks. But there is a real difference expressed by him in a tone of dogmatism upon which I should not venture, although I think I could smash him if he would say what he thought and not only what he didn't believe. He does believe that Hobbes, Bentham, Austin, and every German jurist that ever was were asses. So he has taken rather a large contract.

(2 Letters, page 3)

Now let us turn to Pollock's account of "The Law of Nature" (referred to in his letter to Holmes) and printed in *Essays in the Law:*

> The term "Law of Nature", or natural law, has been in use in various applications ever since the time of the later Roman Republic. Their variety and apparent diversity have tended to obscure the central idea which underlies them all, that of an ultimate principle of fitness with regard to the nature of man as a rational and social being, which is, or ought to be, the justification of every form of positive law. Such a principle, under the name of reason, reasonableness, or sometimes natural justice, is fully recognized in our own system, but the difference of terminology has tended to conceal the real similarity from English lawyers during the last century or more. The neglect of mediaeval learning which followed the Renaissance and the Reformation has also caused us to forget that the Law of Nature has a perfectly continuous history down to the date of its greatest and most beneficent achievement—one might almost say its apotheosis—in the foundation of the modern Law of Nations by Grotius. Much that has been written on this subject, even by eminent authors, assumes or suggests that Grotius revived for his own purposes an almost dormant conception of the Roman lawyers. In fact, the Law of Nature, as Grotius found it, was no mere speculative survival or rhetorical ornament. It was a quite living doctrine, with a definite and highly important place in the mediaeval theory of society. What is more, it never ceased to be essentially rationalist and progressive. Modern aberrations have led to a widespread belief that the Law of Nature is only a cloak for arbitrary dogmas or fancies. . . .
>
> If Bentham had known what the Law of Nature was really like in the Middle Ages, he would have had to speak of it with more respect. . . .
>
> In the course of the seventeenth century the classical tradition of the Law of Nature was broken up after the Reformation controversies, with the result that in this country it has been forgotten or misunderstood ever since. Oblivion went so far that it was possible for Bentham and his followers to suppose quite honestly that the Law of Nature meant nothing but individual fancy. . . .
>
> Although the mediaeval mould of natural law was broken, the substance of its ideas passed into the common stock of European publicists through the new learning of the law of nations, and their influence was manifest in a rationalist movement which had many branches—rationalist because the Law of Nature is essentially so. This last statement would have been a truism in the sixteenth century, and is still familiar on the Continent; it may seem a paradox to some English readers nowadays, but

it remains true. Scotland, kept by political traditions in closer touch with Continental thought than England, had an important share in spreading the movement in these kingdoms. It was no accident that our two great rational law reforms of the second half of the eighteenth century were carried out by Lord Mansfield, a Scotsman by birth.

First of these must be mentioned, though this is not the place for a full account, the definite adoption of the law merchant as part of the Common Law. . . .

Hardly less important was the introduction in Common Law procedure of a liberal and elastic remedy on causes of action *quasi ex contractu*. Blackstone, following Lord Mansfield's creative example as a faithful expositor, said in so many words of this class of actions—those of which the count for "money had and received to the plaintiff's use" is the type—that they arise "from natural reason and the just construction of the law". Thus the whole modern doctrine of what we now call quasi-contract rests on a bold and timely application, quite conscious and avowed, of principles derived from the Law of Nature.

One of the most characteristic and important features of the modern Common Law is the manner in which we fix the measure of legal duties and responsibilities, where not otherwise specified, by reference to a reasonable man's caution, foresight, or expectation. . . . The notions of a reasonable price and of reasonable time are familiar in our law of sale and mercantile law generally. Within the last century and a quarter, or thereabouts, the whole doctrine of negligence has been built up on the foundation of holding every lawful man answerable for at least the amount of prudence which might be expected of an average reasonable man in the circumstances. Now St. German pointed out as early as the sixteenth century that the words "reason" and "reasonable" denote for the common lawyer the ideas which the civilian or canonist puts under the head of "Law of Nature". Thus natural law may fairly claim, in principle though not by name, the reasonable man of English and American law and all his works, which are many. . . .

It is curious that there appears to have been no further correspondence between Holmes and Pollock in regard to the subject, but any who read the passages quoted may wish to read again Mr. Palmer's article on "The Defense Against Leviathan" (32 A.B.A.J. 328).

In connection with Mr. Gregory's illuminating discussion of the background of the Nuremberg Trials (in the September JOURNAL, 544) Pollock's statement in his letter of 1918 that "the Ex-German Emperor" would "have to be tried . . . if at all, by some standard which all medieval . . . doctors would refer to natural law", and that Pollock himself was consulted "to inform the conscience of the Attorney General" (Sir F. E. Smith, later Lord Chancellor Birkenhead) on this very practical problem, are pertinent to the discussion of *ex post facto* law. Reasonable sources of law have always existed in the minds of thinkers about justice, long before they have reached the point of judicial application. It was not for nothing that John Adams in his letters on government to George Wythe and others in Virginia, North Carolina, and elsewhere, in 1776 (4 Adams' Works, 200 and 204) quoted Milton's lines:

> I did but prompt the age to quit their clogs
> By the known rules of ancient liberty.

It seems to me that Mr. Palmer may well ask the American bench and Bar to reconsider some of the views of Holmes and think out the question whether his conception of law is as broad and deep as many supposed it to be. Was Holmes or Pollock the deeper thinker?

We have heard much abuse of *laissez faire* as applied to individuals. Great as Holmes was in many ways, his disciples seem to have introduced to us, or imposed on us, a *laissez faire* of centralized executives, legislatures and administrators, which threatens the American purpose unless it is balanced and controlled by thought, since constitutional law seems to be temporarily, at least, pretty much in abeyance.

"The Case System"

I think Mr. Palmer is unduly disturbed about the "case system", as Mr. Nossaman suggests in his letter in the September JOURNAL (32 A.B.A.J. 616). The lack of a "philosophy of law" which Mr. Palmer notices in lawyers is not, I submit, due to any particular system of teaching, but to common habits which long ante-dated Professor Langdell and his pioneer experiment in teaching men to think. My own experience as a student under the "case system" in the nineties was that it stimulated general thinking. The real trouble is not at all confined to the legal profession—it is a common human distaste for the effort involved in general thought which may invoke possible change of habits. John C. Gray, in the preface to his *Nature and Sources of Law* quoted Dicey's remark that:

> Jurisprudence is a word which stinks in the nostrils of the practising barrister. . . .

and the late James C. Carter in his draft preface to *Law, Its Origin and Function*, referred to the "underestimate among the members of our profession of the importance of theoretical inquiries". He regretted the common neglect both of judges and lawyers to "inquire", whether "the law is the conscious command of a supreme authority, or an unconscious growth in the life of human society".

Current conditions are constantly forcing the need of broader, deeper thinking on the legal profession in performing its traditional functions in the modern world, if it is to rise to its responsibilities.

About fifty years ago, the late William G. Sumner, one of the greatest and most provocative of teachers, told his students at Yale:

> The only Security is the constant practice of critical thinking. . . .
>
> I have no doubt, that, in your lifetime, you will see questions arise out of popular notions and faiths, which will call for critical thinking such as has never been required before, especially as to social relations, political institutions, and economic interests.
>
> . . . There is no limit to the interest which civilized nations have in each other's economic and political wisdom, for they all bear the consequences of each other's follies.

Mr. Palmer's articles are in this great tradition.

Lawyers *in the News*

● The principle of promoting a judicial officer of tested experience, impartiality and temperament was followed by Governor Walter E. Edge, of New Jersey, on September 30, in appointing Supreme Court Justice A. DAYTON OLIPHANT to be Chancellor of New Jersey, the State's highest judicial office. The new Chancellor is expected to take the lead in bringing about the delayed revision of the Chancery rules, procedure, and costs, which the New Jersey State Bar Association has been urging for several years.

A. DAYTON OLIPHANT

In addition to his own twenty years of experience on the bench, the new Chancellor is the scion of an illustrious New Jersey lineage, with a long record of public service and judicial work. Born in Trenton 59 years ago in October, he was graduated from Princeton and the University of Pennsylvania School of Law. His father, Henry D. Oliphant was for many years Clerk of the United States Supreme Court. His Uncle, William L. Dayton, was United States Senator, Ambassador to France, Attorney General of New Jersey, and member of the State Supreme Court.

Young OLIPHANT (the "A" is for Alfred) worked as a newspaper reporter in Trenton, obtained admission to the Bar of New Jersey in 1911, and became a counsellor in 1916. He served for several years in the New Jersey Assembly, was majority (Republican) leader, was prosecutor of Mercer County, and was appointed to the Circuit Court in 1927 by Governor Moore (Democrat). As a trial judge he was firm and courageous, kindly to young lawyers, agreeable as a judge before whom to try cases. Reappointed in 1934 and 1941, he was elevated to the Supreme Court in 1945. His record in that tribunal led to his present designation. He became a member of the American Bar Association in 1924.

In announcing the appointment, Governor Edge said, in part:

"I have always believed in, and generally followed during my public career, as well as in private business life, the policy of promotion when earned and deserved. I believe this policy to be most desirable in making judicial appointments if our Courts are to be kept free of political influence.

"Before making my selection of a Chancellor and succeeding members of the judiciary, I consulted high judicial officers and outstanding members of the Bar, and I have given deep personal consideration to all the characteristics, collateral elements, ability and temperament that appear to me as providing the necessary background and experience for judicial responsibility.

"With the change in Chancellors I have made clear my definite desire for a complete readjustment of this tribunal's policies both as to procedure and personnel and the belief that previous practices must be eliminated in great part.

"In naming Justice Oliphant with his twenty-five years' experience as a court officer, twenty of those years on the bench of our highest courts, I have his assurance these reforms will be speedily inaugurated.

"Justice OLIPHANT has lived in a judicial atmosphere and in more or less cloistered surroundings, which I consider most important, in the administration of the State's highest judicial office."

Members of the New Jersey State Bar Association have recognized that there has been a considerable complaint on the part of the public as to the cost of proceedings in Chancery, the delay in the disposition of Chancery matters, and a desire for a simplification and speeding up of procedure. That has not been done since the Chancery Act of 1915, when a great many of the revisions of the orders in the Chancery division of the Supreme Court of Adjudicature of England were adopted. Much of the desire for a revision of the Court system in New Jersey to bring about a single Court in both Law and Equity jurisdiction was the result of criticism, lay and professional, of the Court of Chancery. On the other hand, many experienced lawyers remain of the opinion that a separate Court of Chancery can do equity and justice promptly and courageously, and more efficiently, than a single Court of both Law and Equity jurisdiction. At the present time, there is said to be actually no difficulty in transferring causes from either the Law or the Equity Courts to the other, but lawyers generally do not utilize the rules to that end. In any event, the new Chancellor has a considerable task ahead of him.

● A Texas lawyer who has already made a good impression in Washington is DOUGLAS WEAR MCGREGOR, who came up to be Assistant Attorney General of the United States. He was born in Springfield, Missouri, in 1902, was graduated from the Bingham Military School in North Carolina, but of course took his law degree at the University of Texas, where he knew a young man by the name of Tom C. Clark.

DOUGLAS W. McGREGOR

McGREGOR began the practice of law in Houston in 1926, and was Assistant United States Attorney during 1927-34, and United States Attorney from 1934 until a few months ago, when he resigned to re-enter practice in Houston. In 1935 he became a member of the American Bar Association. His father is still in active practice in Austin, Texas.

In Texas, DOUGLAS McGREGOR made an impression as a lawyer of ability and good judgment, coupled with courage and a sense of practicality. His friends had hoped and expected that he would be named to the federal bench, for which they believe he has the qualifications of experience and temperament. In Washington, he is back at his old job of sustaining the acts of government and prosecuting the suits brought by government, but under an Attorney General who says he does not want to sue unless the facts will "make it stick".

● October brought to an end one young man's "commuting". For several months, this Colorado youth had been leaving Washington on a Wednesday night train for New Haven, Connecticut, to get back to his studies in the Yale Law School; and then leaving New Haven Sunday afternoon or night for the Nation's Capital. Yale professors have done like that before; but this youth was a law student, and was also law clerk for Chief Justice Vinson. Now his law studies are successfully ended, and he is "full-time" in Washington.

BYRON R. WHITE

Several years ago, we used to see him, afternoons and evenings, in the Sterling Law Library at Yale—very studious, indeed. He was pointed out—rather surreptitiously, because he did not like it—as the famous "Whizzer" White of football fame. We had seen him stir the enthusiasm of great crowds, at gridiron games; we had watched his deadly "dribble" and slick passing, on the basketball court in Madison Square Garden packed to the rafters. "All-America" he was in football; great in baseball and track athletics, too, as well as basketball. Through it all he stuck to his studies and his books, and his wish to become a lawyer. He won a Phi Beta Kappa key and a Rhodes Scholarship to go to England. He was offered higher pay than a Chief Justice's salary at that time, to play professional football. Britain's war with Germany suspended the scholarship; "Whizzer" went to Yale. He had harvested sugar beets and worked on railroad construction, to help pay his way.

Then came his opportunity to serve his country. He was soon out in the Pacific, in Naval Intelligence, with Admiral Mittscher's famed Task Force 58. He saw plenty of action; then he went back to Law School. Soon he will be a member of the Bar. Meanwhile, he works for the Chief Justice.

Born In Wellington, Colorado, twenty-nine years ago, this 195-pound combination of brains, bone, and muscle may be as "terrific" as a lawyer as he was in tossing touchdowns or "baskets". He never was easy to stop. There is a lot of cheering for him again.

● Members of the American Bar Association do not seem to be faring badly in their contests for political office this year. In South Carolina, J. STROM THURMOND, member of the Association since 1935, won the nomination for Governor in a run-off primary in September by a large majority, and will have been elected before this is read.

J. STROM THURMOND

THURMOND is a 44-year-old war veteran, who makes his home in Edgefield, S. C. He served acceptably as a State Circuit Judge, and ran for Governor on a platform which advocated changes in the State government. Describing his victory as "a triumph for good government", he added: "There is no question about it. There will be changes".

● Columbia University's Law School has established professorships bearing the names of two of its most distinguished alumni, Charles Evans Hughes and the late Harlan Fiske Stone, each of whom served as Chief Justice of the United States, and has appointed two outstanding teachers of law, to fill the new posts.

HUGER W. JERVEY

Professor HUGER W. JERVEY, a member of the Law Faculty at Columbia since 1924 and Dean from 1925 to 1928, assumes the Charles Evans Hughes Professorship of Law. He became a member of the American Bar Association in 1925. The Harlan Fiske Stone Professorship of Constitutional Law will be filled by Professor NOEL T. DOWLING, a member of the faculty since 1922, who has been a member of the American Bar Association since 1920.

"It is most fitting that the names of Charles Evans Hughes and Harlan Fiske Stone, outstanding Americans and jurists, should be permanently identified with the Columbia Law School in which they were students and teachers and upon which they reflected such great credit," Dean Young B. Smith of the Law School declared. "It will be especially gratifying to the thousands of alumni

NOEL T. DOWLING

who were pupils of Dean Stone that one of the chairs will bear his name. It is also satisfying to know that the first incumbents of these chairs are men eminently qualified to inculcate in students the ideals and principles characteristic of the lives and work of the two Chief Justices."

Chief Justice Hughes received the degree of LL.B. from Columbia in 1884. He won the Prize Fellowship and from 1884 until 1887 taught law in the school. Later he taught law at Cornell.

Chief Justice Stone, after his graduation from the Columbia Law School in 1898, taught there until 1905. From 1910 until 1923 he served as Dean of the School.

● Texas primaries of its majority party are traditionally "hot", but the nomination is thus far equivalent to an election. As this issue will not come to the desks of its readers until after the polls close in the Lone Star State, we chronicle here the signal success of BEAUFORD JESTER, a member of our Association since 1922, in winning the Democratic nomination for Governor.

BEAUFORD H. JESTER

He was born in 1893 in Corsicana, Texas, practised law there, and still lives there. In World War I, he was a Captain of Infantry, in the Ninetieth Division, in France. This interrupted his law education at the University of Texas, but he went back. He was twice elected a member of the State Railroad Commission, was a member of the Board of Regents of the University for seven years and its Chairman for two years.

Texans liked so well his work, his character, and his stand against extreme and "new-fangled" ideas and innovations in their affairs, that they are making this lawyer their Governor.

● A North Carolina lawyer who has been appointed to have charge of the New York office of the Federal Bureau of Investigation is EDWARD SCHEIDT, who formerly was administrative assistant to J. Edgar Hoover, Director of the FBI, and for the past nine years has been in charge of the office of the FBI in Charlotte, North Carolina.

EDWARD SCHEIDT

He was born, however, in St. Paul, Minnesota, forty-eight years ago, and entered the FBI shortly after he was graduated in 1931 from the Law School of the University of North Carolina. He succeeds Edward E. Conroy, who has been given an indefinite leave of absence because of the recurrence of an ailment contracted in Army service during World War I.

● For his services as Chief of the foremost "under-cover" operations conducted in enemy and occupied countries in Europe by the OSS between November of 1942 and October, 1945, ALLEN W. DULLES, of the New York Bar, has received from the Secretary of War the Medal of Merit. His skillful and at times perilous operations have been described in more than a few magazines, notably the *Saturday Evening Post*. They affected many events in the War.

ALLEN W. DULLES

The Presidential citation praised his "superior diplomacy and efficiency", and said that DULLES had carried out his assignments "in extremely hazardous conditions, and despite the constant observation of enemy agents".

He is a brother of John Foster Dulles, and with him a partner in the firm of Sullivan and Cromwell. Born in Watertown, New York, in 1893, and educated at Princeton and in law at George Washington University, he was long in the diplomatic service of the United States and attended many international conferences, as a legal adviser for the American representatives. He became a member of the American Bar Association in 1934.

● A practicing lawyer is not ordinarily selected to receive the Crowell Gold Medal of the Army Ordnance Association for distinguished services to that organization. The honor was bestowed, October 2, on Brigadier-General JOHN ROSS DELAFIELD, of the law firm of Delafield, Marsh, Porter and Hope, New York City. He has been counsel for the Association during nearly twenty years.

JOHN ROSS DELAFIELD

General DELAFIELD has long been interested in military affairs and in that field, and was at one time the Chief of the New York Ordnance District of the Army.

● A devoted friend of the American Bar Association, a popular member since 1919, and effective champion of several of its chief legislative objectives during his service in the Congress, is WALTER CHANDLER, who on September 1 resigned as Mayor of Memphis, Tennessee, in which city he has practised law since 1909. Born in Jackson, Tennessee, in 1887, and receiving his law degree from the University of Tennessee in 1909, he has held many offices within the gift of the people, and has served with unusual distinction. Mr. CHANDLER was

WALTER CHANDLER

president of the Tennessee Bar Association in 1928, and was the Tennessee member of the old General Council of the American Bar Association (corresponding to the State Delegates) in 1931-35.

All this was attested at a dinner given in his honor by 700 of his fellow-citizens on September 30. The principal speaker was Walter P. Armstrong, of Memphis, former President of the American Bar Association. "As I have known Memphis for the past four decades," declared Mr. Armstrong, "there has been no such honor accorded one who at the time held no office in church, state or civic organization. The people of Memphis by their unanimous acclaim of your conception of duty and by their overwhelming response to your efforts have proved that they are mindful of the unliquidated debt they owe a distinguished public servant".

Mr. Armstrong read a telegram from Justice William O. Douglas of the United States Supreme Court, who was chairman of the Securities and Exchange Commission when Mr. Chandler sponsored and guided through the House of Representatives his revision of the bankruptcy law which is known as the Chandler Act:

> This was an outstanding legislative achievement. It will long stand as a monument to its author.

In his address Mr. Armstrong said, in part:

> As familiar as you are with them the facts of our guest's life could by a competent biographer be woven into a fascinating American success story. A skillful writer might point up the distinguishing characteristics of our State by picturing them in a typical Tennessean. A self-reliant native son; his progress through her public schools and the bright years he spent at her university making friends and acquiring in liberal arts and law a sound education which remained unforgotten and which the study and experience of each passing year have broadened. A member at one time or another of each house of her General Assembly; a leader of her Bar; a commander of her troops; one of her representatives in Congress; and finally, the Mayor of her largest city. Of all the Tennesseans I have known I can think of none who, by birth, inheritance and achievements, better symbolizes his State—of none more aware of her traditions, of none more deeply versed in her history, of none who more fitly embodies those qualities we like to think of as hers.
>
> There are many facets to his career and I shall not attempt to light them all. One of the Walter Chandlers I know best is the lawyer. We hear much about the number of lawyers in public life. Some think there are too many. There need be no fear on that score. There may be too many who hold law degrees or have been admitted to the Bar, but there are not too many real lawyers. Walter Chandler is a real lawyer. I know. I have had the comfort of his support as an associate and have suffered at his hands as an opponent. He is thorough in preparation, sound in judgment, searching in cross-examination and forceful and persuasive in advocacy. Yet he always plays fair, always lives by code. Of him it may be said, as was written of a great English barrister of another day—that stout fighter as he was, he always wielded the sword of the warrior and not the dagger of the assassin.
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> The picture will be deceptively incomplete unless we turn for a moment to the old member of the crack Chickasaw Guards who proved that he was no mere summer soldier by taking his place as an enlisted man in World War I. He was in heavy fighting in the Troyon and Toul Sectors, at San Mihiel, in the Meuse-Argonne Battle and the Woevre Offensive.
>
> The qualities of the lawyer-soldier —the experience he had gained and the capacity for leadership he had developed—admirably equipped him for the constructive work he undertook and accomplished in Congress. His standing as a lawyer secured for him a place upon the Judiciary Committee—a committee so important that it is "exclusive" in the sense that its members are not permitted to belong to any other committee. From knowledge I can testify that our representative was one of the most efficient and probably the hardest working member. Chairman Hatton W. Sumners writes me: "During my service on the Judiciary Committee we never had a more useful member." Results speak for themselves. He sponsored and guided through the House that splendid revision of the bankruptcy law which is called after him the "Chandler Act."
>
> Because you are all familiar with the way in which Walter has discharged his duties as Mayor I shall refrain from details. We are all proud that Memphis has become one of the most progressive, one of the best planned, best financed and best governed cities in the country. Justifiably we boast that what was once "the murder capital of the world" is now a community which wins prizes for its safety record, and in which the law is stringently enforced.
>
> Acknowledgment and appreciation of Walter Chandler's capacity and work as Mayor extended far beyond Memphis. He was vice president of the United States Conference of Mayors, and, except for his resignation, would unquestionably have been the next president of the Conference.
>
> I have often pondered the reasons for this success. Character? Yes! this is the first essential. Genius? No, except that genius which consists in the capacity for taking infinite pains and engaging in unremitting labor. Uncommon common sense. Constant study of the science of government. The power of cogent and persuasive statement orally and in writing. A sunny disposition which attracts friends and will cause him to be written down as one who loved his fellow men. Unflagging devotion to duty. The gift of initiative which makes him a natural leader. Poise, which leaves him "unawed by opinion, unseduced by flattery and undismayed by disaster."

In addition to his sponsorship of the Chandler Act, Congressman CHANDLER was considerably responsible for the passage of the Association's bill to create the Administrative Office of the United States Courts as well as the Act authorizing the Rules of Civil Procedure. The New York *Times* referred to him as "one of the four most useful men in Congress". Although he has returned to his profession, it was predicted at the dinner that he is destined for still higher offices in Tennessee.

Practising lawyer's guide to the current LAW MAGAZINES

ADMINISTRATIVE LAW—*"Comments on the Administration of Section 124 of the Internal Revenue Code":* James P. Durkin of the New York Bar contributes an extended "note" under the above title in the March issue of the *Georgetown Law Journal* (Vol. 34-No. 3; pages 324-341). Section 124 of the Internal Revenue Code was enacted in 1940 to encourage the construction of war facilities. It permitted allowance for the depreciation of those facilities over a period of five years. The author reviews the background of the legislation, particularly the pitfalls encountered after World War I. His chief concern is with the broad administrative discretion conferred by the statute. This, he thinks, amounts to an abdication of responsibility by the Congress. (Address: Georgetown Law Journal Association, 506 E. Street, N. W., Washington, D. C.; price for a single copy: $1.00).

AGENCY—*"The Doctrine of Imputed Knowledge":* A readable informative discussion of the circumstances under which the Courts will impute to a principal knowledge of facts acquired by his agent prior to his agency is in the September issue of the *Insurance Law Journal* (No. 284; pages 616-623). P. F. Hendersons develops his theme by setting forth the facts and surrounding circumstances of *In re Aiken Petroleum Company* v. *National Petroleum Underwriters of Western Millers Fire Insurance Company,* 207 S. C. 236, 30 S. E. (2d) 380, a leading case in which he was counsel for the plaintiff. The article is well documented with authorities; it concludes that knowledge gained by the agent prior to his agency, under the "in mind and memory" test applied by the Supreme Court of South Carolina, should be imputed to his principal. (Address: Insurance Law Journal, Commerce Clearing House, 214 North Michigan Avenue, Chicago 1, Ill.; price for a single copy: $1).

COURTS AND JUDGES—*"Harlan Fiske Stone":* The September issue of the *Columbia Law Review* (Volume XLVI—No. 5; pages 693-800) is fittingly dedicated to the memory of Chief Justice Harlan Fiske Stone, who, in his earlier years, had achieved wide recognition as the learned and progressive Dean of the Columbia Law School. The memorial is composed of articles written by Chief Justice Stone's intimate associates, both at the Law School and on the bench. Dean Young B. Smith pays tribute to Stone as "teacher, scholar and Dean." Professors Cheatham, Gellhorn, Magill and Wechsler appraise the Chief Justice's contributions to the development of new doctrines in the fields of conflict of laws, administrative law, taxation, and constitutional law as a whole. As important as these articles are in recording the substance of Stone's work as a judge and scholar, they will seem less significant at this time than the terse tribute of Associate Justice Douglas, himself one of Stone's own students at Columbia, the careful appraisal by Judge Learned Hand of Stone's conception of the judicial function, and the engaging recollections of Colonel Alfred McCormack, who was law clerk for Stone during the 1925 Term of the Supreme Court (and who, incidentally, was a classmate of Justice Douglas at Columbia Law School).

One finds in Justice Douglas' comment, not merely the personal tribute of one whose association with Stone had been cemented by strong ties of affection and intellectual agreement. Justice Douglas seems also to be citing the late Chief Justice as the desirable antithesis of some of the turbulent personalities now associated with the Court. "Men do not sit on the bench as advocates for any class, party or race. They sit to administer equal justice under the law," says Justice Douglas. Referring to the great devotion of Stone to the Court, Justice Douglas also says: "His deep faith in those fixed principles permeated his work. He saw the Court performing a unique and all-important role—more permanently important than any other office of government. He would therefore protect the Court as an institution at all costs and defer personal preferences or feelings to its good.

"The largeness of his viewpoint, the wide horizons of his intellect freed his work on the Court of any prejudiced or petulant quality. His decisions reflected insight, understanding and tolerance. He was a fair and an upright judge—one of the most judicious ever to sit on the bench. . . ." (Address: Columbia

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the JOURNAL *will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.*

Law Review, Kent Hall, Columbia University, New York 27, N. Y.; price for a single copy: 85 cents).

COURTS—*Trial Practice—"The Jury Problem":* In the July-August issue of the *Illinois Law Review* (Vol. 41—No. 2; pages 183-198), Judge Julius H. Miner, of the Circuit Court of Cook County, Illinois, discusses the jury problem with particular reference to the need for instructing prospective jurors in the general nature of a trial and its procedures and principles, especially in criminal cases. To this end, Judge Miner sets forth in the article a considerable amount of material, in outline form, which he proposes for distribution in printed pamphlet form, by the proper legal authorities, to all prospective jurors in criminal cases. With this article could well be read Editor Jack Foster's observations on "The Layman and the Courts: Judges, Jurors and Justice", which is published in this issue of the JOURNAL. (Address: Illinois Law Review, 357 East Chicago Avenue, Chicago, Ill.; price for a single copy: $1.)

CRIMINAL LAW — *"The Lie-Detector":* The April 1946 issue of the *Boston University Law Review* is devoted to a symposium on scientific proof and the relations of law and medicine (Vol. XXVI—No. 2; pages 89-289). Among the seven worthwhile contributions is an article, entitled as above, by Fred E. Inbau, Professor of Law at Northwestern University and formerly Director of the Chicago Police Scientific Crime Detection Laboratory. Mr. Inbau describes in non-technical language the function of the examiner in the lie-detector test, and explains the importance of the usual control procedures, both in deception diagnosis and in distinguishing the nervous reactions of an innocent person from the lie reactions of a guilty subject. His estimate accords to the lie-detector technique an accuracy of approximately 75 per cent which is a much more modest figure than has been claimed by some examiners. He notes, however, that recent research and experimentation have contributed much toward greater accuracy in the tests. The author expresses his view that lie-detector tests, if conducted by competent and experienced examiners, are of considerable practical utility, as they make possible the detection of deception with greater accuracy than is otherwise attainable, and they also have a decided psychological effect in inducing admissions from guilty individuals. (Address: Boston University Law Review, 11 Ashburton Place, Boston, Mass.; price for a single copy: 70 cents).

EVIDENCE—*"Burden of Proof of Excepted Causes in Insurance Policies":* The leading Comment in the September issue of the *Columbia Law Review* (Vol. XLVI—No. 5; pages 801-817) contains an extensive annotation of the problems of proof in contests over the coverage of insurance policies, especially where the issue is over the existence of an exception to the principal clause of the policy. The exposition favors the development of a uniform rule which would place the burden of proving the excepted cause on the insurer. (Address: Columbia Law Review, Kent Hall, Columbia University, New York 27, N. Y.; price for a single copy: 85 cents).

FEDERAL LEGISLATION — *"The Federal Food, Drug and Cosmetic Law":* The September issue of the *Food-Drug-Cosmetic Law Quarterly* (Vol. 1 — No. 3) is devoted to a report of the proceedings of a meeting held in New York, under the auspices of the Section on Food, Drug and Cosmetic Law of the New York State Bar Association, to commemorate the fortieth anniversary of the original Federal Food and Drugs Act of 1906. In those proceedings, tribute was paid by public and business leaders to this landmark legislation and to its dynamic founder, the late Dr. Harvey W. Wiley; and consideration was given to the legal, health and industrial significance of the 1906 Act, as amended and fortified by the Federal Food, Drug and Cosmetic Law of 1938. Of particular interest to members of the Bar will be the papers on the "legislative history" of the original 1906 Act, by Charles Wesley Dunn, Chairman of the Section; the "administrative progress" under the Act as amended, by Dr. Paul B. Dunbar, Commissioner of Food and Drugs, in the Food and Drug Administration of the Federal Security Agency; the legal aspects of the Federal food, drug and cosmetic laws, by J. Howard McGrath, Solicitor General of the United States, and the relationship of the Federal food, drug and cosmetic laws to the overall national and international public health programs, by Dr. Thomas Parran, Surgeon-General of the United States Public Health Service, President of the International Health Conference. The *Food-Drug-Cosmetic Law Quarterly* is published in March, June, September and December. (Address: Commerce Clearing House, Inc., 214 North Michigan Avenue, Chicago 1, Ill.; price for a single copy: $2.50.)

INTERNATIONAL LAW—*"Property and War: In Particular, the Swiss - American - German Conditions:"* As law among Nations and affecting their nationals and property within the territories of other countries takes on increasingly a "bread-and-butter" aspect in the practice of many American lawyers, there is a growing interest in articles which contain dependable background and analyses for the assistance of practitioners who have to struggle and advise in these unfamiliar fields. A timely and helpful exposition under the above-quoted title is the leading article in the March number of the *Georgetown Law Journal* (Vol. 34—No. 3; pages 265-287), from the gifted pen of Dr. Ernst Schneeberger, formerly a legal adviser of the Swiss Foreign Office, secretary of the Swiss Legation in

Washington since 1944. His treatment of enemy property, American legislation on the subject, the relative applicability of international and domestic law, the legal status of persons and property in enemy territory, the legal status of persons on the "black list", and the liabilities of actual enemy persons, is objective, clearly reasoned, and well worth getting and keeping for reference. (Address: Georgetown Law Journal, 506 E Street, N.W., Washington, D. C.; price for a single copy: $1.00).

INTERNATIONAL LAW—*"International Trade Barriers":* The Summer-Autumn issue of *Law and Contemporary Problems* (Vol. XI—No. 4; pages 631-850) contains a series of articles dealing with various aspects of the problem of removing barriers to postwar world trade. In addition to articles on the general subject of cartels and other restrictive practices permitted in foreign countries, the collection includes a number of specialized articles on foreign banking and taxation questions. (Address: Law and Contemporary Problems, Duke Station, Durham, N. C.; price for a single copy: $1.00).

MILITARY LAW — *"The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and The Yamashita Case":* An important contribution to the material on questions of martial law arising out of World War II is the leading article in the July issue of the *Harvard Law Review* (Vol. LIX — No. 6; pages 833-882), under the above-quoted title. The author, Professor Charles Fairman, executive head of the Department of Political Science at Stanford University, has made a special study of current developments of military law in this country. He reviews the recent judicial pronouncements of the Supreme Court with respect to the balancing of considerations of military security and civil liberties. Although the Court's decision in the *Steer* and *Duncan* cases (66 Sup. Ct. 606) assertedly rests on the interpretation of the Organic Act for Hawaii, in holding that the right to the writ of *habeas corpus* had been invalidly suspended in favor of military and provost court procedures, the decision in effect, according to Professor Fairman, reasserts "the traditional subordination of military to civil power" (page 861). He is inclined to the view that consideration of the cases after the conclusion of active hostilities had much to do with the Court's conclusions.

Professor Fairman agrees in general with the decision of the Court in the *Yamashita* case (66 Sup. Ct. 340), which upheld the military commission procedure for trying "war criminals." A keen realization of the inherent difficulties of conducting such trials in strict accordance with traditional Anglo-American concepts of judicial procedure (difficulties faced in gathering evidence, constituting tribunals and the like) seems to the author to justify an application of the doctrines of the "common law of war." In the "largest judicial operation ever undertaken", according to Professor Fairman, the Supreme Court has wisely "left the responsibility with the executive branch of the Government" and "probably not one innocent man will be convicted." (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: 75 cents).

PATENT LAW—*Rights of Inventors and Owners—"Confusion, Unlimited":* In the March issue of the *Georgetown Law Journal* (Vol. 34—No. 3; pages 302-309), Robert W. Englehart, of the Michigan Bar, has written outspokenly of the confusions, the uncertainties, and the denials of right, into which American invention and enterprise have been plunged by judicial decisions. "Probably no field of the law is in such a state of confusion", he says. "Confused thinking seems to reign supreme . . . the Government has broken its promise to the inventor". (Address: Georgetown Law Journal, 506 E Street, N.W., Washington, D. C.; price for a single copy: $1.00).

TAXATION —*"T. D. 5488: The Treasury Interpretation of the Clifford Ruling":* A note under the above title, in the April issue of the *Columbia Law Review* (Vol. XLVI — No. 4; pages 601-613), comments upon the Treasury's recent attempt to crystallize and restate by way of official regulation the principles of the decision of the Supreme Court in *Helvering* v. *Clifford* (309 U. S. 331), which held that a husband who had declared himself trustee of certain securities for the benefit of his wife could nevertheless, under the facts of the case, be held taxable on the trust income as a part of his personal income. The author concludes that the Treasury has gone beyond the Courts in extending the principles of the *Clifford* case. This has been accomplished by giving independent significance to elements of control which, under the Court decisions, were conclusive for tax purposes only in combination with other elements. (Address: Columbia Law Review, Kent Hall, Columbia University, New York 27, N. Y.; price for a single copy: 85 cents).

TAXATION — *Federal Income Taxes—"Basis in Tax-Free Reorganizations":* An article under the above-quoted title in the August issue of *Taxes* (Vol. 24—No. 8; pages 707-718) gives a resume of some of the problems involved in the determination of the transferee's basis and the substituted basis in several types of non-taxable reorganizations, including complete liquidations of subsidiary corporations as well as bankruptcy and receivership reorganizations. It re-emphasizes that the determination of the applicable basis after a corporate reorganization involves an initial determination as to whether or not the reorganization qualifies as non-taxable; it reviews some of the factors involved in such a determination. Several recent cases defining various terms used in the reorgani-

zation section of the Internal Revenue Code (Section 112) are noted, and attention is directed to some of the requirements of substance to achieve non-taxability in reorganizations, as distinguished from mere form, which have been read into the statute by judicial decision. The point is made that in order to carry forward the basis of a transferor, it still is vital to comply with the formalities. The article was prepared by Robert S. Holzman, a tax accountant in New York City, and is an extension of material which he presented at a meeting of the Federal Tax Forum in May of 1946. (Address: Taxes, % Commerce Clearing House, 214 North Michigan Avenue, Chicago 1, Ill.; price for a single copy: 50 cents).

TORTS—*"The Formative Era of Contributory Negligence":* An interesting exposition of the development of the doctrine of contributory negligence, by Wex S. Malone, Associate Professor of Law, at Louisiana State University, is in the July-August issue of the *Illinois Law Review* (Vol. 41—No. 2; pages 151-182). It is the author's thesis that the requirement for proving freedom from fault, as a condition precedent to recovery in negligence cases, received its impetus during the expansion of railroads in this country, and from the resulting attempt by courts to counteract "plaintiff-mindedness" on the part of the average juryman in the interests of fair play in litigation involving large railroad corporations. Although he uses the decisions of the appellate courts of New York as fairly representative of the course of judicial experience over the latter half of the last century, his observations should be of value to negligence lawyers in most jurisdictions. (Address: Illinois Law Review, 357 East Chicago Avenue, Chicago, Ill., price for a single copy: $1.00.)

TRAFFIC REGULATIONS – *"A Uniform Enforcement Policy":* Enforcement officials of the State of Michigan have launched an experiment in the treatment of traffic violations which may prove helpful in the control of highway traffic and the dispatch of business relating to it in the Courts. Maxwell Halsey, Executive Secretary of the Michigan State Safety Commission, describes the Michigan program in the *American Journal of Police Science,* which is included in the July-August issue of *The Journal of Criminal Law and Criminology* (Vol. XXXVII – No. 2; pages 157-187). Under the new enforcement policy, which is the product of more than a year's study by Michigan officials, a driver guilty of a violation is given a "violation notice ticket" which lists the six principal violations that contribute to about eighty per cent of automobile accidents, and six conditions which increase the danger of these violations. Check marks made on the ticket by the police officer indicate both the violation and any aggravating condition, and produce a hazard rating which, if below a certain level, obliges the violator to appear at a violations bureau. If the "name file" at the bureau shows that it is the driver's first offense in twelve months, the ticket is returned to him as a written warning, but a second such offense results in a trip to court. A hazard rating above the level automatically results in a trip to court. The author submits that the enforcement system will appeal to police officers and administrators, to judges and to the public, since it takes some of the guess-work out of policing, gives warning of the treatment which will be accorded violators, and is specific and clear-cut. (Address: The Journal of Criminal Law and Criminology, 357 East Chicago Avenue, Chicago 11, Ill.; price for a single copy: $1.00).

TRANSPORTATION POLICY –*"Competing Modes of Transportation and the ICC":* A timely discussion of policies, theories, arguments and procedures relating to our national transportation policy appears in the July issue of the *University of Pennsylvania Law Review* (Vol. 94—No. 4; pages 378-399). The author, Allen Schrag, sides with those who believe that present regulatory measures administered by the Interstate Commerce Commission need overhauling to put competing modes of transportation to their most economical use. Reference is made to various declarations of Congressional policy on the subject which the author has difficulty in harmonizing. Should our transportation policy follow the preamble of the Transportation Act of 1940 and encourage coordination of the various modes of transportation into an integrated system or should it emphasize the independence from each other of competing transportation media as apparently required by the Panama Canal Act and certain sections of the Interstate Commerce Act? In the ICC's handling of applications for certificates of public convenience and necessity and "tacit approval" of carrier rate making practices through bureaus and conferences, the author sees a tendency to stifle competition in transportation in favor of the railroads. In his view, it would be "desirable as well as feasible" to permit competitive forces "to determine the proper territorial and functional sphere for each mode of transportation, on condition that provision be made to assure the continued existence of each, although perhaps in seriously modified form" (page 399). At a time when difficulties are being experienced in returning coastwise shipping to private operation because of maladjustments in the water-rail rate structure and when the application of the anti-trust laws to the conference method of rate-making is a much debated and aggressively litigated issue, Mr. Schrag's comments on and analysis of this complicated subject should stir considerable interest. (Address: University of Pennsylvania Law School, 3400 Chestnut Street, Philadelphia 4, Pa.; price for a single copy: 75 cents.)

Tax Notes

Prepared by Committee on Publications, Section of Taxation: Mark H. Johnson, Chairman, New York City, William A. Blakely, Dallas, Texas, Philip Bardes, Howard O. Colgan and Martin Roeder, New York City, Allen Gartner, Washington, D. C., and Edward P. Madigan, Chicago.

Family Partnerships —Gift Tax

The income tax aspects of family partnership transactions have been a prolific source of litigation. Potentially, the gift tax problems in these cases are perhaps as difficult, but the law on the subject has not yet crystallized. The first two of these cases have recently been decided by the Tax Court, and the decisions seem to forecast many more cases in the near future.

In *William H. Gross,* 7 T.C. No. 98, the taxpayer discovered and manufactured a skin ointment. For many years, the operations were carried on by a corporation 80% of whose stock was owned by him, and the balance by his wife. His wife, daughter, and son-in-law worked in the business. Even after deduction for their salaries, the corporation had a large net income. The corporation was then liquidated, and the assets transferred to a new partnership composed of the four members of the family. No capital was credited to either the daughter or son-in-law, but each obtained a right to 10% of the net profits, the taxpayer retaining 60% and his wife retaining her original 20%. The government contended that the 20% interest obtained by the daughter and son-in-law was a taxable gift.

The Tax Court sustained this contention. It held first that there could be a gift even though no capital account was created. The right to future income is a valuable property right. An important corollary to this rule would seem to be that, where the taxpayer does make a gift of a capital account, the value of the partnership interest is not limited to that amount. The court then held that there was no evidence that the services to be rendered by the donees were adequate consideration for this property right. To the contrary, "the close family relationship supports inferences both of a lack of adequate consideration and a donative intent". It is interesting to note that the parties had agreed upon a valuation of the gift in the event that the court found that such a gift was made, and the court accepted this valuation.

An interesting secondary issue in the case was whether the taxpayer had "reasonable cause" for failing to file a timely gift tax return. The court refused to impose the penalty, because the case was one of first impression, because there was no "long history of legislative or administrative action to impress upon taxpayers the obligations imposed by transactions of this nature", and because the taxpayer acted upon advice of counsel.

In contrast to this decision, the court held that no gift tax was incurred in *Willoughby J. Rothrock,* 7 T.C. No. 99. Here, two individuals operating a brokerage and commission business in foodstuffs took in their respective sons as partners. Both sons had valuable knowledge and experience. The court pointed out that the facts showed that "business considerations rather than family relationships dictated the result." Moreover, "there were no valuable manufacturing tangibles or exclusive processes, products, or trade names". There was, therefore, no gift of "presently valuable business prospects".

Black Market Sales

The Bureau has ruled that a taxpayer who sells depreciable business property at a price in excess of O.P.A. ceiling may not take advantage of the capital gain provisions of I.R.C. §117 (j). The portion of the gain represented by the excessive selling price is taxable as ordinary income. I.T. 3811, I.R.B. 1946-16-12364. If this ruling is justifiable, it would seem equally applicable to the gain on capital assets as defined in §117 (a).

This ruling is analogous to a prior ruling that the cost of merchandise in excess of price control regulations is to be disallowed in the computation of income. See I.T. 3724, C.B. 1945, 57. Both are attempts to convert the tax law into a police regulation. Price violations, it is submitted, should be prosecuted as such. There is no statutory authority for subjecting them to extraordinary tax penalties.

Charitable Deduction of Trust—Capital Gain

If capital gain is distributable to a charity, the entire payment is deductible from the trust's income, even though only a percentage of that gain is reportable by the trust under § 117. *John E. Andrus Trust,* 7 T.C. No. 70.

Lessor's Payments to Cancel Lease

It has long been established that a payment made by the lessor for the privilege of canceling a lease is a capital expenditure which must be amortized over the unexpired term of that lease. The Tax Court has reaffirmed this rule, in a case where the taxpayer obtained the cancellation in order to enter into another lease for a shorter term. The court rejected the taxpayer's contention that the payment should be amortized over the life of the new lease. *Clara H. Heller Trust,* 7 T.C. No. 67.

JAMES C. CARTER

(Continued from page 730)

enable him to enter. He did not hesitate to avail himself of the generous aid of an admiring fellow townsman who recognized his great qualities, and meant that they should not be lost to the world. Just as Rufus Choate once told me, that it would be better to borrow the money for your college education at ten per cent compound interest than not to get the education at all.

Well, seeing his manifest ability, his spirited and attractive personality, and his sympathetic interest in all our college affairs, we all recognized him as our leader. He exercised a potent influence upon all his companions. He was made Class Orator at Commencement—and entered upon life with assured prospects of success. But still the lack of means was an obstacle to his immediate entrance upon the profession of the law, to which he looked forward as the only one possible for him. I believe that he never had a thought of any other occupation in life. So, upon graduating he betook himself to teaching as a necessary means to that great end. . . . At the same time in 1850, he entered the office of Kent & Davies as a student. . . .

What an impression he had left at the office in New York, in spite of his scanty attendance there, appears from the fact that in February, 1853, Mr. Davies visited the Law School and said that he had come on to see Mr. Carter—that his firm of Kent & Davies was about to dissolve—that he was going to take Henry J. Scudder as junior partner and wanted Mr. Carter to come to him as managing clerk. Mr. Carter accepted the position, and was soon after admitted to the Bar in New York. In 1854, Mr. Davies withdrew, to become Corporation Counsel, and the firm of Scudder & Carter was formed, with whom it was my good fortune to study the Code in the following year. This firm under its successive organizations of Scudder and Carter, Carter and Ledyard, Carter, Rollins and Ledyard, and Carter, Ledyard and Milburn has occupied a great place in the annals of the profession in New York. . . .

He made no brilliant debut in the Courts as Mr. Evarts had done in the celebrated Monroe Edwards case. He was not plunged at once into a great volume of business as some of us were who joined as juniors, old and long established firms, the elder members of which were already overworked. He had to paddle his own canoe and work his way up stream. But slowly and surely on a solid basis of work well done, he advanced step by step, and soon came to be recognized by his seniors at the Bar, by such men as Daniel Lord and O'Conor and Cutting and William M. Evarts and William Curtis Noyes, as a young man who must be reckoned with, and as a foeman likely to be worthy to meet them in any cause.

From the first he aimed at nothing short of perfection in everything that he undertook, and as his ideals were high, and his conscience supreme, this involved an amount of labor and self absorption seldom if ever exceeded. In those days he had but few social duties or pleasures to distract him from minding the main chance, success on the forensic side of the profession, and to that he was able and eager to devote all his energies of mind and body. I know of no lawyer whose success was more fairly earned or more thoroughly deserved, or less derived from adventitious sources or external aid. By his own might he worked his way to the front. Let me try very briefly to trace the personal qualities which were the weapons by which he won the victory. For I have known personally all the lawyers in New York who for the last fifty years have one after another been foremost among us—and no two of them were alike.

Well, he had a very sound mind in a very sound body. But those are the common and necessary requisites of any measure of success. His mental endowments were of a very superior and splendid quality, and he appreciated his own intellectual powers and revelled in the exercise of them. Thinking, which to most of us is a painful and tiresome process, he delighted in, and pursued it as a most fascinating game. His mind was of a decidedly philosophical turn, fond of considering and solving all the problems of human society and progress—and the reasoning powers which in most of us are dwarfed or twisted, in him were naturally and fully developed. Logic as a pastime was as acceptable to him as golf or bridge is to the average man to-day.

He was undoubtedly extremely ambitious—but his ambition was of a very high order and made of the sternest kind of stuff. He would not stoop to conquer and disdained to climb by unworthy means. His nature was robust and his disposition combative, so that he loved the contests of the forum and its triumphs and trophies were a great joy to him. He eagerly seized the palm of victory, but with him it was always *palma non sine pulvere*, and always fairly won.

His conscience was clear as crystal, and never went back on him, as it sometimes does on men whose mental vision is less clear than his.

Absolute independence was the controlling feature of Mr. Carter's mind and character. It marked and guided his whole conduct, professional, public and personal. He must act on his own carefully matured judgment no matter with whom or with what it brought him in conflict—and he had the courage which naturally accompanies such independence of character.

He was not without a large share of self assertion, and yet was one of the most unselfish of men.

Imbued with a high sense of public duty, and most ardently patriotic, he studied with keen interest public questions as they arose from time to time, and was ever willing to give his fellow citizens the benefit of his opinion, but he never sought office and never allowed his interest in public affairs to distract him for a

moment from the pursuit of his chosen profession, well knowing what a jealous mistress the law is.

His power of labor was prodigious, and as he had given no hostages to fortune in the shape of wife and children, he was always ready and able to serve his clients and the cause of justice with relentless devotion.

By nature warm-hearted and magnanimous, he was one of the most loyal and persistent of friends, and in spite of his contentious life, I never heard of his having an enemy. He was too just and generous for that. . . .

His professional conduct and habits were just what you would have expected from such a character. He honored and magnified his profession, and fully recognized the debt which, as Lord Bacon says, we all owe to it. He scorned all mean and trifling arts, and relied solely on the merits of his cause and his own prowess in maintaining it.

He had a unique habit when he had embarked in a cause, of first convincing himself of its justice, before he undertook to convince Court, or jury, or adversary. He was very far from limiting himself to causes that he thought he could win, or to such as were sound in law or right in fact. No genuine advocate that I know of has ever done that. He recognized and maintained the true relation of the advocate to the Courts and the community, that it is a strictly professional relation, and that either side of any cause that a Court may hear, the advocate may properly maintain. For him newspaper clamor had no terrors. He realized that the newspaper is accuser, judge and executioner, all in one, but for all that he could and did maintain the unpopular side of a controversy with the same zeal and fidelity, as if the whole press were backing his client's claims. . . .

The time prescribed to me will hardly permit even an allusion to the great services rendered by Mr. Carter in maintaining by precept and example the dignity of the profession, and its protection from everything unworthy, in preserving the common law in its integrity as the basis and method of our jurisprudence, and rescuing it from the destructive assaults of the wholesale codifier; in his constant and courageous warfare against everything that looked like corruption in the Courts or in the profession; in his active participation in the foundation of this Association (The Association of the Bar of the City of New York), as the bulwark of a sound and pure administration of justice; in his service again and again as its President, and in his persistent and successful efforts at all times to keep it up to the mark, and to achieve through its instrumentality the lofty objects of its founders.

It is melancholy to think how fast the memory of all this splendid service and achievement, of which I have given such a meagre and inadequate sketch, is fading away. He had for the last six or seven years of his life retired absolutely from the practice of his profession, so that to the younger members of the Bar his face and figure, which had once been so familiar in the Courts, were almost unknown. . . . But all the while his heart and mind were intent upon a great work, which he had left as a legacy to the profession. . . .

In a course of carefully prepared lectures on the philosophy of the law, which I have had the privilege of reading, completed just before his death, and intended to be delivered at the Harvard Law School, he has embodied the rich fruits of his ripe experience and learning, of which it will be an enduring monument. He has explored and portrayed the whole history of human conduct, in support of his favorite theory that law instead of being a "command" as defined by Austen, and other distinguished writers upon the subject, is entirely the growth of custom and of public opinion, that the common law as developed by English and American Courts is the wisest and safest form of administering justice, and best adapted to the ever changing needs and exigencies of human society, and that all attempts to substitute in its place a rigid and crystallized codification in any form, must necessarily fail of their object. In this effort he has garnered up all the wealth of learning, of imagination, of common sense and of foresight, which in his long and busy life, devoted to his divine mistress, he had made his own. It is delightful to think that this masterpiece of legal literature, practically perfect as it came from his hand, will transmit some knowledge of the man to future generations, when all the great controversies in which he was engaged have lost their interest and been forgotten.

ROSS ESSAY

(Continued from page 756)

economic power in the hands of labor must submit to the supremacy of the law. "We gain nothing by exchanging the tyranny of capital for the tyranny of labor."[55] During the past century management showed an evolution in industry in three stages, as one writer describes it, of (1) construction, (2) fiscal management, and (3) more recently in the sphere of industrial relations.[56] A comparable evolution is no less evident in the leadership of our American labor movement. Pioneers of American labor were raised in the rough and tumble of its early stages at the end of the nineteenth century. Lately, under government protection and sympathy, labor leaders have added to their powers a skill in negotiation and advocacy.[57] Today labor is finding it expedient to develop experts who can interpret the economic, social, and political factors which affect labor.

Labor has come of age. Having demanded, and through the Wagner Act received, the right to equal bargaining *power,* labor can no longer treat its correlative *responsibilities* with adolescent evasion. The public interest requires statesmanship today among labor leaders no less than among the captains of industry.[58] Franklin D. Roosevelt, long hailed by labor as its fast friend,[59] was of this opinion. Addressing Congress in 1938 he said:

> The ownership of vast properties or the organization of thousands of workers creates a heavy obligation of public service. *The power should not be sought or sanctioned unless the responsibility is accepted as well.*[60] (Italics supplied)

In many cases, labor is responsible and performs its contracts. The record of the railroad unions has been a model for industry.[61]

What principles of law apply to labor disputes?

First. Since the beginning of the law—*salus populi est suprema lex.*[62] The law must be supreme and it must be certain.[63] Talk of individual liberty in industrial relations without law is self-contradictory.[64] So is talk about "natural rights" as if they were different from legal rights today.[65]

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55. Brandeis, *op. cit. supra* note 1, page 27.

56. Bradley, *Industrial Relations and the Curriculum,* (1945) 12 Social Research, 433, at 441.

57. Griffin, *Set-'Em-Up-In-Other-Alley-Zimring,* (1946) 42 Mass Transportation 112. Nor would anyone accuse John L. Lewis, for example, of lacking skill in labor negotiations.

58. Some states have already recognized the importance of labor relations as a field of study for educational institutions. In 1922 Princeton University established an Industrial Relations Section in its Department of Economics and Social Institutions. At Cornell University in 1944, there was established the New York State School of Industrial and Labor Relations (pursuant to L. 1944, Ch. 162, and L. 1945, Ch. 259). This school is the first of its kind in the United States. Similar schools are contemplated in other states. See Bradley, *op. cit. supra* note 56, pages 434, note 1, and 444, *seq.*

59. See "The President and Labor Disputes," Metz, *op. cit. supra* note 41, pages 249-54. "President F. D. Roosevelt was much more active in this field than any of his predecessors. He intervened in no less than four labor disputes each year after 1933." *Id.* page 250.

60. *Vital Speeches of the Day,* Vol. IV, No. 7, (January 15, 1938), page 220 at 223. Alvanley Johnston, President of the Brotherhood of Locomotive Engineers in a letter to the writer (quoted by permission) indicated the control over individual union members exercised by that brotherhood in the assumption of their responsibility as a union. "Suffice it to say that in event a member and/or members of our organization should break a contract held by the Brotherhood with an employer, they are subject to expulsion by the organization and dismissed from employment of the carrier." See Wolf, *The Railroad Labor Board* (Chicago: University of Chicago Press, 1927), pages 103-7. National labor organizations might well be given similar control over locals in industrial unions.

61. In response to the writer's request, President A. F. Whitney of the Brotherhood of Railroad Trainmen, in a letter dated April 25, 1946, authorized the following statement of his views on this subject:

> "Of course labor should be responsible for its contracts, and labor is responsible in the overwhelming majority of cases. Just as in the case of businessmen, there are men of labor who lack integrity and responsibility, but certainly in proportion to numbers, the responsibility of the leaders of organized labor is far greater than the responsibility of American business leaders. Westbrook Pegler could find volumes to write on the waywardness of business if he just followed the daily reports of the Federal Trade Commission.
>
> "The tronble is that employing interests have almost complete control of the American press, radio and magazines, not to mention their influence on schools, churches, farm groups and various clubs. The lie that labor is irresponsible is so frequently repeated that only those who have made serious study of the situation can be expected to be free from the influence of this false propaganda."

President Whitney's views on the employing interests' control of the press, etc., are not without *impartial* confirmation. See Bradley, *loc. cit. supra* note 56 at page 437; Jackson, *Look at the Law* (New York: E. P. Dutton & Co., 1940), Chap. XII, page 335, *seq.*

62. "The safety of the people is the highest law." "In any scheme of social interests, first place must be given to the claim or demand, asserted in the name of the social group and generalized in terms of social life, to be secured against those forms of action or courses of conduct which threaten the social existence. This paramount claim may be called the social interest in the general security. It has many forms. In its simplest form, it is an interest in the general safety, long recognized legally in the maxim that the safety of the people is the highest law." Pound, *Criminal Justice in America* (New York: Henry Holt and Company, 1930), pages 6-7.

63. See President David A. Simmons' Annual Address at the opening session of the 68th Annual Meeting of the American Bar Association at Cincinnati, Ohio, delivered December 17, 1945, entitled, "The Supremacy of Law," reprinted in (1946) 32 A.B.A.J. 17.

64. Testifying before the House Labor Committee on December 10, 1945, John L. Lewis, UMW President, expressed these views:

"*Cong. Fisher.* You would have no objection to any law that would help to enforce and make valid an enforceable contract, between management and labor arrived at as a result of collective bargaining?

"*Pres. Lewis.* I don't think Congress could enact a bill that could control the variables of human nature.

"*Cong. Fisher.* It would be all right for Congress to try, would it not?

"*Pres. Lewis.* I think no—not in our free America. At least, I hope they won't practice on me."

As quoted in the United Mine Workers Journal, Vol. LVI, No. 24 (December 15, 1945), page 4. *Cf.* Wolf, *The Enforcement of Collective Labor Agreements* (1938) V Law and Contemp. Prob. 273. "Finally, to require collective bargaining without requiring the resulting contract to be observed appears to be putting the cart before the horse." *Id.* at page 281.

65. Blackstone's remarks are appropriate:

"*Natural Liberty.* The absolute rights of man, considered as a free agent, are denominated the natural liberty of mankind, which consists in a power of acting, as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, when God endowed man with free will. But every man, when he enters into society, gives up a part of his natural liberty as the price of so valuable a boon, and obliges himself to conform to those laws, which the community has thought proper to establish. Otherwise, there would be no security to individuals in any of the enjoyments of life.

"*Civil Liberty.* Political or civil liberty is no other than natural liberty, so far restrained by human laws, as is requisite for the general advantage of the public. The law which restrains a man from doing mischief to his fellow citizens though it

Mr. Justice Holmes was well aware of this.[66] The courts, as well as all citizens in the Nation, are subject to the sovereignty of the law.[67] *"Where there is no law, there is no freedom."*

Second. In contract law, *negotiations* do not constitute a contract. The mere expectation that a contract will be entered into and that negotiations have been made to carry that expectation into effect, do not constitute a contract.[68] Labor leaders who fight for liberty of contract and the right to strike in this situation are therefore on firm ground.[69] Since parties, singly or collectively, should be free to enter or not to enter into any contract, the right to refuse to sell his services except at an agreed price should be preserved for every American. This is true whether he is bargaining alone or collectively. The only limitation is this: The law must by judicial process protect the paramount interest of the public. Therefore, the right to strike must be retained subject only to the *suprema lex*—the safety of the people.

Third. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[70] Businessmen have criticized labor unions most severely for their failure to perform the obligations of their contracts. Management feels that there is not equality of *responsibility* under present labor law, although that law has achieved equality of bargaining *power*.[71] As an English judge said: "Either all is *nudum pactum* or else one promise is as good as the other."[72]

How do these legal principles apply to labor disputes?

The bulk of labor disputes falls into the four following categories:[73]

1. *Representation cases.*
2. *Negotiation cases* in which the parties are bargaining on wages, hours, and working conditions looking toward a contract or revision of the terms of an existing contract.[74]
3. *Grievance cases* in which the interpretation and construction of the terms of the contract are in dispute between the company and the union.
4. *Intra-union disputes.*

The representation cases and the intra-union disputes need not detain us. The representation cases are being handled by the election procedure of the NLRB and state boards without too much criticism. The suggestion that the employer be allowed to petition for an election where rival unions each claim to represent his employees has merit. *May Dept. Stores Co.* v. *NLRB*, 326

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diminishes the natural, increases the civil liberty of mankind; but every causeless restraint of the will of the subject is a degree of tyranny, and even laws themselves, if they regulate our conduct in matters of mere indifference, are destructive of liberty. That constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject master of his own conduct, except in those points, wherein the public good requires some direction or restraint. Locke has well said: 'Where there is no law, there is no freedom.' "

Blackstone's Commentaries (Browne's Ed., St. Paul: West Publishing Co., 1897), pages 38-9; 1 *Bl. Comm.* *125-6.

66. "The most fundamental of the supposed pre-existing rights — the right to life — is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it." Holmes, *Natural Law* in Collected Legal Papers (1921) 314. "The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere." *Id.* at page 312.

67. "If there is any law which is back of the sovereignty of the state, and superior thereto, it is not law in such a sense as to concern the judge or the lawyer, however much it concerns the statesman or the moralist. The courts are creatures of the state and of its power, and while their life as courts continues, they must obey the law of their creator." Cardozo, *The Growth of the Law*, (New Haven: Yale University Press, 1924), page 49.

68. I Williston, Contracts (rev. ed. 1936) §28. "The distinction between preliminary negotiations and completed contracts is often involved in cases where the parties contemplate the execution of a written agreement. . . . It is also everywhere agreed that if the parties contemplate a reduction to writing of their agreement before it can be considered complete, there is no contract until the writing is signed." See also Restatement, Contracts (1932) §§ 25 and 26.

69. "Stop strikes. What for? When you stop strikes by taking away the right to strike in this country, you just change the form of government in America again. The only difference between serfdom and freedom is the right of voluntary contract. When men were serfs in the Middle Ages, they could not barter for their goods or their services. Some one else had that power. When men were made free, they were restored the power of voluntary contract, they could barter for their goods and services, they could withhold their goods if the price was not valid in their judgment, and they could withhold their services if the price was not valid in their judgment.

"Take away that right in America and you turn the clock back to the Middle Ages. You strike down freedom and you substitute the absolute form of government." John L. Lewis, *supra* note 2.

70. Restatement, Contracts (1932) §1; I Williston, Contracts (rev. ed., 1936) §1.

71. At its 1946 Convention, the Chamber of Commerce of the United States adopted ten "Basic Principles" for industrial relations in America. No. 6 was: "We believe in union responsibility for its acts, just as we believe in the same responsibility for the employer."

72. Lusk, *Business Law* (Chicago: Business Publications, Inc., 1939), page 260.

The following is a fair statement of the average American businessman's understanding of his contractual obligations:

"When parties enter into a contract, one or both of the parties to the contract assume duties which are to be performed at some time in the future. If these duties are not performed in full, the party who has failed in his performance has breached the contract and the other party has the right to sue and recover damages unless, for some reason, the defaulting party has been relieved from his duty of full performance. The general rule is that one must perform his contractural duties fully and in strict compliance with the terms of the contract." *Ibid.*

73. (1946) 62 Monthly Labor Review 731-32, especially Table 10, page 732. See the *Ninth Annual Report of the National Labor Relations Board*, 1944, pages 18, 23 36 and Table No.3, page 79; the *Sixth Annual Report of the Division of Conciliation*, Dept. of Labor and Industry of Minnesota, for the year ending June 30, 1945, Table No. 7, page 10; *Third Annual Report of the Michigan Labor Mediation Board* (for the fiscal year ending June 30, 1944) page 13, Table D, Detroit Area; *Annual Report of the Industrial Commissioner* of New York State (for the 12 months ending December 31, 1943) page 251, Table 3; *Eighth Annual Report of the New York State Labor Relations Board* (for the year ending December 31, 1944) page 45, Table I; *Annual Report of the Alabama Department of Labor* (for year ending September 30, 1945), pages 20-21; *Annual Report of Wisconsin Employment Relations Board* (for year ending June 30, 1944) page 3, Table A.

74. The fact that the parties have a present contract containing a renewal clause to the effect that this contract "shall remain in full force and effect until and including March 31, 1947, and shall remain in force from year to year thereafter, except that it may be changed as herein provided," makes no difference. So far as contract law is concerned, the parties are, for all practical purposes, bargaining at arm's length, for a *new* contract. See *Adair* v. *United States*, 208 U. S. 161, at 173.

U. S. 376 (1945), 384-85. Intra-union disputes are in the minority, and union members have the procedure of state law open to them, just as the members of any similar association have.[75] The majority of labor disputes arises either in negotiation cases or grievance cases. Here most strikes occur. How shall we apply the judicial process to these cases?

Applying the above three legal principles to the *negotiation* cases:

1. It is not unreasonable to require the parties to exhaust legal negotiation machinery *before* a work stoppage takes place.
2. The right to strike must be preserved unless a work stoppage will disastrously affect the public interest.

In *grievance* cases:

1. Both parties, having freely contracted, should be required by law to perform their contractual obligations.
2. No strike or lockout should be allowed under an existing contract until (a) a determination or award has been made by an impartial body; and (b) the other party to the contract has refused to abide by that award. At that point, failure of performance on one side excuses performance on the other side Then a legal strike should be allowed unless the work stoppage will disastrously affect the public interest.

If these basic principles are sound, how can the law apply them to the settlement of labor disputes by the judicial process, *in its more restricted sense*? What are the possible methods of settling industrial disputes, eliminating trial by battle! Here they are in order of legal compulsion:

1. Conference between the parties.
2. Conciliation.[76]
3. Mediation.[77]
4. Voluntary arbitration.[78]
5. Compulsory arbitration.[79]
6. Government seizure.[80]
7. Government ownership.[81]

75. *Railway Mail Association* v. *Corsi*, 326 U. S. 88 (1945). Minnesota has enacted a "Labor Union Democracy Act" (L. 1943, Ch. 625), providing for quadrennial elections of officers by secret ballot on reasonable notice, and which requires annual financial statements to be furnished to union members, etc. Similar legislation is pending in the New York State Legislature. See Senate Bill No. 2614 (March 7, 1946), §731. Several other states have such statutes.

The following recent Supreme Court decisions bear on this point: *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (1942) (sustains Wisconsin Employment Peace Act, L. 1939, Ch. 57, Wis. Stat. 1939, Ch. 111); *Hill* v. *Florida*, 325 U. S. 538 (1945) (holding unconstitutional L. Fla. 1943, Ch. 21968, 565, which licenses business agents of unions); *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945), and *CIO* v. *McAdory*, *id.* 472 (1945) (wherein the Court declined to rule on the validity of the "Bradford Act" of Alabama in a declaratory judgment proceeding).

76. The *Report of the Michigan State Labor Mediation Board*, 1943-44, page 1, contains a succinct definition of conciliation, mediation, and arbitration: "The conciliation or mediation of a dispute may best be defined as that process of deliberation which provides for the opportunity of a voluntary and peaceful settlement of the differences involved. Conciliation is accomplished between the disputants alone — mediation with the assistance of a third party. Arbitration, on the other hand, may be said to be that course of action which provides for a hearing of the differences involved by an arbitrator or arbitrators, the decisions of whom shall be binding upon both parties to the dispute." The Michigan Statute (L. 1939, Act No. 176) provides for a mediation procedure.

The *Thirty-Third Annual Report of the Secretary of Labor*, submitted June 30, 1945, at pages 18-19, indicates that 80% of all industrial disputes were settled by conciliation. In 95% of the cases in which they entered before a stoppage had occurred, Conciliation Commissioners were able to prevent stoppages during the period covered by the Secretary's *Report*.

77. *E.g.*, National Mediation Board. Dr. John R. Steelman, Director of the United States Conciliation Service, oldest federal labor relations agency, in a "New Year's Message" radio address, January 1, 1941, said:

> "If the struggle now going on in the world means anything in the economic field, it is a struggle between the principle of free enterprise and free labor, on the one hand, and the principle of state dominated management and state regimented labor on the other.
>
> *"That latter principle, I abhor, not only because of its stifling of the human spirit but because it is an obstacle to the greatest efficiency and the greatest potential utilization of the world's resources to meet human needs and human desires. Purely from the standpoint of efficiency, it is the human hands and minds behind the machines and then, in the final analysis, the spirits animating these hands and minds which really count. Respect and confidence and whole-hearted effort can never be legislated. You cannot decree peace and harmony. And you cannot compel men and women to give, day in and day out, the very best which is in them. If I have a creed on labor relations, this is it."* (Italics, Dr. Steelman's.)

78. New York State has the oldest state arbitration law. It was enacted in 1920. Civil Practice Act, Secs. 1448-1469. In a recent decision the New York Court of Appeals said, "Under the new statute arbitration became both orderly and enforcible and was made subject in effect to a decree for specific performance. A quarter of a century of its operation has demonstrated its usefulness and general acceptability. To work well, it must operate with a minimum of delay and with all the flexibility which equity can give it." *Feuer Transportation Inc.* v. *Local Union No. 445 of International Brotherhood of Teamsters*, 295 N. Y. 87 (1946) per Medalie, J. See also McGovern, *The Trend of Arbitration* (1946) 18 N. Y. State Bar Assn. Bulletin 59. In 1946, approximately 16 states have arbitration laws similar to New York's. It is in use throughout the British Empire. McGovern, *loc. cit.*, at pages 59-60. And see *Selection of Impartial Arbitrators*, (1946) 32 A.B.A.J. 29.

79. *E.g.*, The Amendments of 1934 to the Railway Labor Act provided for the establishment of a National Railroad Adjustment Board. "This Board is the only permanent agency actually engaged in compulsory arbitration in the United States." Metz, *op. cit. supra* note 41, at page 244. *Cf.* National War Labor Board.

80. Government seizure has been a method used recently by the President. Metz, *op. cit. supra* note 41, pages 249-53. In May, 1946, President Truman seized the nation's railroads and bituminous coal mines. In neither case did seizure itself avert the strikes. New York *Times*, May 18, 1946, page 3, col. 2; editorial, "Seizing the Railroads," *id.* page 18, col. 1.; editorial "The Strike Crisis," *id.* May 23, 1946, page 20, col. 1. New Jersey in 1946 adopted a bill outlawing public utility strikes. L. 1946, Ch. 38, R. S. Cum. Supp. 34:13B-1, *seq.* This statute provides for seizure and compulsory arbitration of disputes arising out of labor contracts with public utilities. Governor Edge has already exercised his authority under this act. See Krock, *Two States Face Problem of Utility Strikes*, New York *Times*, April 2, 1946, page 26, col. 6. Metz, *op. cit. supra* note 41, page 263, discussing the National War Labor Board. Editorial, "Defiance of Government," New York *Times*, June 5, 1946, page 22, col. 1.

81. During World War I, on December 26, 1917, the President issued a proclamation taking over for the federal government the entire transportation system of the United States, effective December 31, 1917 at 12:00 o'clock midnight. Until 12:01 A.M., March 1, 1920, the railroads of the United States were operated by the federal government. For a review of the labor progress made during this period see Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency* (1937) 46 Yale L. J. 567, at page 570; Spencer, *The National Railroad Adjustment Board* (Chicago: University of Chicago Press, 1938), *passim;* Sharfman, *The Interstate Commerce Commission* (New York, the Commonwealth fund, 1931), Chapter IV, "The War Experience and its Significance." Recently A. F. Whitney, President of the Brotherhood of Railroad Trainmen advocated government ownership of the nation's railroads. New York *Times*, May 12, 1946, page 5.

8. Outlawing strikes entirely.[82]
9. Making striking treason.[83]

What models do we have embodying the best among the above methods and how have they worked?

President Truman has recommended to Congress that "for the settlement of industrial disputes in Nation-wide industries there be adopted the principles underlying the Railway Labor Act."[84] This Act has won high praise from many sources.[85] One leading authority has said that its principles embody "the sum of our wisdom and experience to date, and constitute the highest and most successful development in this country of governmentally guided industrial relations."[86]

The Railway Labor Act of 1926 was the culmination of many years of experimenting by Congress in federal labor disputes machinery.[87] The Act has worked effectively. The two-day railroad strike in May was the first important rail stoppage since its enactment. The Act, briefly, provides the following steps in a labor dispute:

1. Collective bargaining by conference.
2. Mediation by the National Mediation Board.
3. If mediation fails, both parties can agree to arbitration.
4. If the parties refuse arbitration, upon certification by the National Mediation Board, the President can appoint a fact-finding board to make recommendations during a "cooling-off" period. Public opinion is relied upon to gain acceptance of the report of the fact-finding board.

There is no present law which compels the parties to accept the findings of the President's board, as the recent rail strike demonstrated. This is a defect in the Railway Labor Act. Application of eminent domain principles would remedy this defect; *i.e.*, compel the railroads to operate in the public interest on the basis of the fact-finding board's report and require the parties to continue to negotiate the terms of their contract. *Salus populi est suprema lex.* Government operation would end when the contract was signed.

The 1934 amendments to Section 3 of the Railway Labor Act established the National Railroad Adjustment Board. The Adjustment Board was given jurisdiction of disputes between employees and carriers "growing out of grievances or out of the interpretation or application of agreements concerning rates

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82. *The Right to Strike*, letter by Arthur A. Ballantine, reprinted in 92 *Cong. Rec.*, June 4, 1946, page A3360. "Are Strikes Good?" editorial, New York *Times*, May 10, 1946, page 18, col. 1. "Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." *Dorchy v. Kansas*, 272 U. S. 306 (1926), 311, per Brandeis, J. The importance of government seizure or ownership lies in the fact that the idea is current that it is illegal to "strike against the government." William Green, A. F. of L. President, speaking in Philadelphia on March 18, 1946, said: "For our part, the American Federation of Labor unions representing civilians employed in Naval shipyards recognize the special status that exists in labor-management relations when the employer is the United States Government. We never have and we never will strike against the government." The United States Supreme Court in *Wilson v. New*, 243 U. S. 332 (1917), upholding the Adamson 8-hour law for railroad workers, said: ". . . . whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, *such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest. . .*" (at page 352; italics supplied).

83. No American leader has yet come forth with such a drastic solution for our present day strike problem. However, on March 29, 1946, Gov. Wm. M. Tuck of Virginia issued an order "drafting" an estimated 1600 essential workers of the Virginia Electric and Power Company into that state's "unorganized militia," to avert a threatened strike. He had previously declared a "state of emergency." After having been "drafted" the workers were issued an order which stated *inter alia*, "you are now subject to the military law of Virginia, and for disobedience to orders you are subject to such lawful punishment as a court-martial may direct." See Krock, *Two States Face Problem of Utilities Strikes*, New York *Times*, April 2, 1946, page 26, col. 5.

On May 25, 1946, President Truman requested a joint session of the House and Senate to enact "temporary emergency legislation" which would "authorize the President to draft into the armed forces of the United States all workers who are on strike against their government." 92 Cong. Rec. May 25, 1946, at 5861.

84. 91 Cong. Rec. December 3, 1945, 11471. The President added: "The general pattern of that act is not applicable to small industries or to small local disputes in large industries. But it would be effective, as well as fair, in such widespread industries, for example, as steel, automobile, aviation, mining, oil, utilities, and communications. . . . The objective would be to cover by legislation only such stoppages as the Secretary of Labor would certify to the President as vitally affecting the national public interest." *Ibid.*

85. For two excellent discussions of the work of the National Railroad Adjustment Board, see Spencer, *The National Railroad Adjustment Board* (Chicago: Univ. of Chicago Press, 1938); and Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, (1937) 46 Yale L. J. 567. *Virginia Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515 (1937) at 553, note 7; *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, (1937), at 42.

86. "The history of the railroad industry seems to demonstrate that the establishment and maintenance of satisfactory relations between labor and management (given the essential prerequisites of trained, seasoned and intelligent labor leaders, patient and dispassionate managers and a relative equilibrium of bargaining power) depend upon the following factors:

(1) The frank recognition of the rights of employees to organize and to select representatives of their own choosing, whether these representatives be employees, non-employees, or labor unions as entities;

(2) the frank acceptance of collective bargaining which means the making of honest efforts to regularize by agreement wages, hours and working conditions;

(3) the reduction of these agreements to writing;

(4) the creation of machinery for facilitating from time to time of desired changes in the terms of these agreements; and

(5) the creation of additional and separate machinery for the quasi-judicial interpretation and enforcement of the agreements.

Over a stretch of fifty odd years these principles, through trial and error and step by step have been written into our railway legislation. . . . they represent the sum of our wisdom and experience to date, and constitute the highest and most successful development in this country of governmentally guided industrial relations." Garrison, *loc. cit. supra* note 85, at pages 592-93.

87. The first act dealing with railroad labor relations was approved by President Cleveland on October 1, 1888. It provided for two methods: (1) arbitration, and (2) inquiry by two commissioners appointed by the President whose report was to be made public. "In 1888 Congress in the passage of the Railroad Arbitration Act set up a naively innocuous scheme for the voluntary arbitration of railway labor disputes. In the Erdman Act of 1898, it substituted a complicated scheme for the existing one. In the Newlands Act of 1913, Congress clarified and strengthened the machinery for voluntary arbitration. In the Transportation Act of 1920, it made no provision for arbitration as such but did not repeal the Newlands Act. In the Railway Labor Act of 1926, Congress repealed all previous legislation on the subject and adopted, in revised form, the scheme originally set up in the Erdman Act. The amended Railway Labor Act of 1926 continued the existing scheme without revision." Spencer, *op. cit. supra* note 85, at pages 13-14, n. 28.

of pay, rules, or working conditions, . . ." (Sec. 3, (i)). The Adjustment Board's function is judicial.[88] In this, it is a unique administrative agency.[89] Its awards, based on bi-partisan compulsory arbitration, deal only with the construction and application of existing contracts. The awards of the Adjustment Board are binding on each party and are enforceable by judicial process upon filing in the United States District Court.[90]

As a practical matter, awards of the Adjustment Board have been enforced by a union strike vote. This method is in accordance with settled principles of contract law.[91] The Adjustment Board engages in *compulsory* arbitration, but this is no valid objection in labor disputes. What legal contracts today—excepting labor agreements—are not subject to interpretation and settlement by compulsory judicial process in our courts of law? What superior method have civilized people discovered?[92] "Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope in the world?"[93]

The Railway Labor Act still holds the respect of both carriers and unions.[94] Logic, history, and utility demonstrate the soundness of the recommendation for legislation to settle industrial disputes modeled, in part at least, on the Railway Labor Act. What then are the "standards of right conduct" which a comprehensive labor relations act should embody that will be fair to employer and employee and at the same time protect the paramount public interest?

VI. The Remedy: Suggested Standards for a Labor Relations Act

The task of the law-makers today is to set up a code of fair labor standards. This should not be done piecemeal, in haste, in a spirit of vindictiveness, or to curb the excesses of any individual, union, or company.[95] With this in mind, it is submitted that a fair code of labor relations should include the following:

A. *Protecting the Public Interest.*

1. Provisions regarding industrial stoppages.

a. Negotiation cases:

(1) In all industries both parties should be required to negotiate in good faith, then to exhaust machinery of conciliation, mediation, and voluntary arbitration, before a work stoppage occurs. A 60-day "cooling-off" period should be required after notice of intention to strike.

(2) To protect the public from deprivation of the necessities of life pro-

88. "The mistake was not made as in the case of the United States Railroad Labor Board, of mixing with the judicial duties, the duty of passing upon disputes regarding wages and desired changes in agreements. Disputes of this latter sort come under the jurisdiction of the National Mediation Board, which endeavors to compose them and failing that, to induce the parties to submit to arbitration. If arbitration fails, the President may appoint an emergency board to investigate and report as provided in the 1926 Act." Garrison, *loc. cit. supra* note 85, at page 576.

89. "The National Railroad Adjustment Board . . . is . . . the only administrative tribunal, federal or state, which has ever been set up in this country for the purpose of rendering judicially enforceable decisions in controversies arising out of the interpretation of contracts. The contracts with which the Board deals are between carriers and labor organizations, governing rates of pay and working conditions. The Board has no other functions; it is exclusively a quasi-judicial body." Garrison, *loc. cit. supra* note 85, at page 567.

90. Railway Labor Act, as amended, Sec. 3 (m) and especially Sec. 3 (p). ". . . . labor organizations have discouraged claimants from utilizing the statutory method of enforcing awards. They are convinced that in the long run they cannot compete with the superior legal talents and tactics of carriers in formal litigation. The labor organizations accordingly rely upon their collective strength to secure compliance with awards made in their favor. If after a lapse of a reasonable time the carrier does not comply with an award or series of awards, the labor organization involved takes a strike vote. . . . *So far no strike has actually occurred as a result of the failure of a carrier to comply with an award of the Adjustment Board.* As a matter of fact, carriers have in a great majority of cases, with some halting and hesitation, complied with the awards of the Board." Spencer, *op. cit. supra* note 85, at page 56. (Italics supplied).

91. "A failure, without justification, to perform all or any part of what is promised in a contract, is a breach thereof." Restatement, Contracts (1932) §314.

"In promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional. An immaterial failure does not operate as such a discharge." *Id.* §274.

"(1). A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty." *Id.* §397.

92. "What more can any fighting labor organization or employee ask for?

"What else would insure justice to all parties and protection to the public interest?

"How can such an irreconciliable conflict be decided except by compulsion?

"Is not the compulsion of a judicial decision to be preferred to the compulsion of armed forces of the government or of privately organized force?

"There is no solution in a contest of force except compulsory arbitration. In a choice between compulsory arbitration through the use of brute force by organized labor or organized money, and compulsory arbitration by an impartial governmental tribunal, is there any question as to which is the civilized and just method?" Donald R. Richberg, *Proposed Industrial Relations Act, III—Compulsory Arbitration,* The Baltimore Sun, July 13, 1945, reprinted in the Congressional Record for July 17, 1945, at pages A-3786-87. *Cf.* Senator Robert A. Taft's remarks on the Case bill (H. R. 4908), 92 Cong. Rec. May 31, 1946, pages 6115-17; *Senator Wayne Morse on Compulsory Arbitration* (1946) I Arb. J. (N. S.) 72.

93. Lincoln's First Inaugural Address, March 4, 1861, reprinted in Stern, *The Life and Writings of Abraham Lincoln,* (New York: Random House, 1940) page 656.

94. Louis Stark, *Owners, Men Keep Faith in Railway Labor Act,* New York *Times,* May 29, 1946, page 2, col. 3.

95. See *A. F. of L.* v. *Watson,* 66 S. Ct. 761 (1946).

"There is a very real danger that if moderate legislation regulating labor unions is not adopted in the near future, the growth of abuses in labor unionism and the reluctance on the part of labor union leaders to admit the necessity for moderate regulation may result in a popular reaction leading to unnecessarily severe legislation such as has been already adopted in several states, and this would do grave harm to the best interests of labor and consequently to the public itself.

"Moreover, labor unions should be subject to certain standards of behavior, not only because of the abuses of a minority of them, but also because they have become immensely powerful economic units. Great economic power,[8] wherever it may reside, should be subject, in the public interest, to certain legislative standards of conduct." *Report and Resolution of the Committee on Labor Law of the New York State Bar Association,* adopted at the Sixty-Eighth Annual Meeting, January 19-20, 1945, page 3. See also, the same Committee's *Report* submitted at the Sixty-Ninth Annual Meeting, January 25-26, 1946.

vided by utilities and "national disaster" type industries, additional machinery is necessary. After fact-finding and public report, government seizure and operation of the affected industry *for the public* is justified by eminent domain law. ". . . private interest must give way to a superior right" in the government to protect all the people. *United States* v. *Willow River Power Co.*, 324 U. S. 499 (1945), at 510. Government operation should be upon the terms of the commission's report, leaving the parties free to continue their negotiations. This preserves freedom of contract and avoids involuntary servitude. Strikes or lockouts during government operation should be illegal and a crime.

(3) Loss of employee status for voluntarily quitting work, and of company profits during government operation, are the sanctions which should be used to enforce the foregoing provisions.

b. *In grievance cases*, an Industrial Board of Adjustment should be created, independent of the NLRB, to handle the judicial administration of employer or employee grievance cases arising under *existing contracts*. In these cases, stoppages should not be permitted until an award has been made and either party has refused after a limited, reasonable time to abide by the award. Stoppages should be permitted to last so long as the public interest is not disastrously affected, as in negotiation cases above.

2. Strikes by unions of government employees should be illegal.

3. Obstruction of interstate commerce by secondary boycott, robbery, extortion or violence by unions should be made illegal and a crime.

B. *Protecting Labor's Interest.*

1. The right of labor to organize as at present must be preserved. The right of employees to select collective bargaining representatives must be retained. The employer should be given the right to petition for an election where rival unions each claim to represent his employees. Once a union has been certified by the Labor Board, the employer and the certified representative should be protected against strikes by rival labor organizations.

2. Collective bargaining *power* of unions should be maintained as under the Wagner Act.

3. Prohibition of unfair labor practices by employers as proscribed by Section 8 of the Wagner Act must be retained.

C. *Protecting the Employer's Interest.*

1. Certain unfair labor practices on the part of employees and unions should be declared illegal including:

a. "Sit-down" and "wild-cat" strikes.[96]

b. Instituting a strike or work stoppage in violation of a valid collective bargaining agreement for the purpose of violating the terms of such agreement.[97]

c. Picketing or boycotting, except during the course of legal labor disputes.[98]

d. Mass picketing. This provision should apply to the public as well as to labor unions and employees.[99]

e. Failure or refusal to bargain in good faith.

2. The Norris-La Guardia Act should be modified to permit the enforcement by injunction of the above provisions.[100]

D. *Protecting the Union Member's Interest.*[101]

1. Adequate provision should be made by law for the election of union officials and officers by secret ballot at stated terms on reasonable notice to all members.

2. Unions should be required to submit annual financial statements, independently audited to their own members and the state.

3. A "labor referee" or commission should be created to hear and decide intra-union disputes in the first instance, with the right of appeal to a state or federal court.

4. No disciplinary proceedings or expulsion from membership should be permitted

96. See Section 15, Michigan Labor Mediation Act, Mich. Rev. Stats. [17.454 (15)].

97. See Minnesota Stats. 1941, Sec. 179.11 (1). See Cooper, *loc. cit. supra* note 30, at page 386.

98. Minn. Stat. 1941, Sec. 179.11 (5). *Cf. A. F. of L.* v. *Bain*, 165 Ore. 183, 106 P. (2) 544 (1940) holding L. Ore. 1939, C. 2, limiting picketing, unconstitutional on basis of *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Stapleton* v. *Mitchell*, 60 F. Supp. 51 (D. C., D. Kan.) (1945) holding unconstitutional portions of the Kansas Labor Control Law.

99. Minn. Stat. 1941, Sec. 179.13. *Cf. A. F. of L.* v. *Bain*, *supra* note 98.

100. See Minn. Stat. 1941, Sec. 179.14. See also §2 of the proposed New York State Labor Practices Act, Senate No. 2614, introduced March 7, 1946, amending Sec. 876a, par. (c) of subdiv. 10, of the Civil Practice Act. Sec. 23 of the proposed "Federal Industrial Relations Act," (Senate 1171), the so-called "Ball-Burton-Hatch" bill, is subject to the criticism that it does not segregate, as seems desirable, the unfair labor practices of employers and employees. *Cf.* the Minnesota Act, Secs. 179.11 (employees) and 179.12 (employers). The Minnesota form seems preferable. And see Wis. Stats. §111.06.

101. See Minnesota Labor Union Democracy Act, L. 1943, Chapter 625. Also 1945 *Report and Resolution of the New York State Bar Association Committee on Labor Law*, pages 6-7; *Railway Mail Association* v. *Corsi*, 326 U. S. 88 (1945).

without a fair and adequate hearing for the member involved in accordance with union by-laws, which shall provide a procedure in accordance with due process of law.

5. Control over dues and other financial matters should be vested in the members of the unions.

6. Coercion of employees or union members to join labor organizations or to strike against their will by threats or actual interference with their persons, families, or property should be made illegal and an unfair labor practice.[102]

E. *Some Provisions Which Are Not Recommended.*

1. Any provision requiring labor unions to incorporate or "licensing" business or other agents of unions.[103]

2. Any provision outlawing strikes or picketing entirely.

3. Any provision repealing *in toto* anti-labor injunction statutes like the Norris-La Guardia Act.

F. *Enforcement and Liability Provisions.*

1. Provisions requiring unions to pay civil damages for illegal acts seem desirable, even though they merely re-state the Common Law.[104]

2. Prevention of illegal acts by unions, employer and employee should be enforced by amending present statutes and by injunction.[105]

3. Withdrawal of certification from the representative of the employees is an effective method of enforcing compliance with the legal machinery set up.[106]

4. The Act should provide for the adoption of reasonable rules and regulations pursuant thereto.[107]

VII. Conclusion

A statute embodying the above principles would provide for the settlement of labor disputes by judicial process. The paramount need today is an imposition upon national labor organizations of legal responsibility to exercise their powers through judicial process with due regard for the public interest. The Brandeis doctrine should serve as the foundation of such a national policy.[108] "Statism" is not the answer.[109] We should not worry ourselves overmuch about past errors. The judicial process is shaping the progress of our labor law, but the judicial process requires a statute for the judges to apply. The inescapable lesson is that we should adapt the principles and methods of an improved Railway Labor Act to industrial disputes.[110]

> "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for the judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest

102. Minn. Stat. 1941, Sec. 179.11 (7).

103. Mr. Justice Brandeis at one time felt that incorporation of labor unions would afford the protection to the public and the employer which are required. See Brandeis, *The Incorporation of Trade Unions, op. cit. supra*, note 1, page 88, especially at page 90. He never waivered in his view that unions should be legally responsible. "The unions should take the position squarely that they are amenable to law, prepared to take the consequences if they transgress and thus show that they are in full sympathy with the spirit of our people, whose political system rests upon the proposition that this is a government of law, and not of men." *Id.* page 98.

The Colorado "Labor Peace Act," Ch. 131 Sess. L. 1943, required in Sec. 20 (1), that labor unions in that state incorporate. This provision was declared unconstitutional in *A. F. of L.* v. *Reilly*, 155 P. (2d) 145 (Colo. 1944).

Certification or withdrawal of certification appears to be an adequate substitute, along with provisions for liability in damages. Regarding "licensing" see *Hill* v. *Florida*, 325 U. S. 538 (1945).

104. Brandeis, *op. cit. supra* note 1, pages 93-98; Minn. L. 1945, Ch. 414; N. Y. Senate Bill No. 2614, Sec. 729 (page 4); U. S. Senate Bill No. 1171, 79th Congress, 1st Sess., Sec. 12 (c).

105. Brandeis, *op. cit.*, at pages 90 and 92. See also Minn. Stats. Sec. 179.14; N. Y. Senate Bill No. 2614, Sec. 2 (page 10); U. S. Senate Bill No. 1171, 79th Congress, 1st Sess., Sec. 12 (c).

106. See Minn. Stat. 1941, §179.15; N. Y. Sen. Bill 2614, Sec. 735, (page 8); U. S. Senate Bill No. 1171, Sec 12 (d), (page 36).

107. See Minn. Stat., §179.05. The Minnesota Division of Conciliation has issued "Rules and Regulations for Proceedings Under Minnesota Labor Relations Act," under date of January 2, 1946. See also U. S. Sen. Bill 1171, Sec. 13 (h).

108. Slichter, *Needed: A Basic Labor Policy*, New York *Times*, June 9, 1946, Sec. 6, page 10; Donald R. Richberg, "A National Labor Policy," an address before the Academy of Political Science, New York City, April 12, 1946. Mr. Richberg is a co-author of Senate 1171 and one of the draftsmen of the Railway Labor Act. The grievance procedure of Senate 1171, 79th Congress, 1st Sess., has evoked favorable comment. Comment, *The Effect of W. L. B. Grievance Decisions on the Rights of Labor* (1946) 40 Ill. L. Rev. 526, 539-40.

109. Johnston, *Labor Should Have a Stake in Capitalism*, Reader's Digest, May, 1946, page 12; Text of the "Policy Statement" by Anti-Reuther UAW Group, New York *Times*, April 19, 1946, page 4, col. 4; Jackson, *op. cit. supra* note 61, page 341.

110. "The Railway Labor Act has preserved peace on the railroads for twenty years, not because of exceptional conditions in that industry, but because it embodies the indispensable requirements of any law to preserve domestic peace.

"The proposed Federal Industrial Relations Act [Sen. 1171, 79th Congress, 1st Sess.], introduced by Senators Hatch, Burton and Ball, June 20, 1945, is based on the same principles and methods." Richberg, *loc. cit. supra* note 108. See also "How to Prevent Strikes," an address by Mr. Richberg before the Chicago Association of Commerce, October 31, 1945.

C. I. O. President Philip Murray, has said of this bill, "The C. I. O. has stamped the Ball-Burton-Hatch bill, otherwise known as the Richberg bill, as a brazen and arrogant endeavor to shackle trade unions." *B-B-H—An Evil Bill*, published by the Congress of Industrial Organizations, Washington, D. C., page 3.

111. *Labor and the Law*, by Judge John C. Knox, American Mercury, June, 1946, page 670; Slichter, *What Do the Strikes Teach Us?* (1946) 177 Atlantic Monthly 35; McGraw, *The Labor Crisis—It's up to Congress*, Business Week, June 8, 1946, page 48; editorial, "After the Veto," New York *Times*, June 12, 1946, page 26, col. 2. Krock, *Labor Has the Situation Well in Hand, id.* June 13, 1946, page 26, col. 6. A variety of views of experts in labor problems will be found in *Hearings before Committee on Education and Labor on S. 1661*, 79th Cong., 1st and 2d Sess. (1945-46), Parts 1 and 2. This Senate Committee's report on the Case bill (H. R. 4908) is found in Sen. Rep. No. 1177, 79th Cong., 2d Sess. (1946). *Cf.* the minority views of Senators Ball, Taft, and Smith, Sen. Rep. No. 1177, Pt. 2, 79th Cong., 2d Sess. (1946). And see President Truman's message on his veto of the Case bill, 92 Cong. Rec., June 11, 1946, page 6798, in which he said: "Equality for both and vigilance for the public welfare—these should be the watchwords of future legislation." *Id.* at 6801.

and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute the processes of justice for the more primitive method of trial by combat." Mr. Justice Brandeis dissenting in *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443 (1920) at 488.

The Statue of Justice surmounts many courthouses in America. In her left hand she holds evenly-balanced scales—the scales of justice. The sword she clasps in her right hand represents her power to maintain order during controversy and to enforce her just decrees. To Americans she symbolizes the judicial process. The scales of justice in labor law must be evenly balanced. President Truman's veto of the Case bill (H. R. 4908) on June 11, 1946, leaves to Congress the problem of drafting permanent labor legislation to attain equal justice under law. Certainly today there is an urgent call upon the legal profession to do a great work for America.[111]

LEGISLATIVE REORGANIZATION ACT

(Continued from page 744)

wrongful act or omission of an employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. The Section further provides that the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances except that the United States shall not be liable for interest prior to judgment or for punitive damages. It also provides that costs shall be allowed in all Courts to the successful claimant to the same extent as if the United States were a private litigant, but not attorneys' fees.

Compromises: Limitations

Section 413, Part 3, authorizes the Attorney General to settle any claim, after the institution of suit, with the approval of the Court in which such suit is pending. Section 420, Part 4, provides that every claim against the United States cognizable under the title shall be barred unless within one year after such claim accrued or within one year after the date of enactment of the Act, whichever is later, it is presented in writing to the federal agency out of which activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of the Act, whichever is later, an action is begun pursuant to Part 3 of the title.

General Bridge Act

In the past Congress has given its consent for the construction of bridges over navigable waters, by the passage of individual bridge bills. By including Title V in the Legislative Reorganization Act of 1946, Congress gave its general consent for the construction, maintenance, and operation of bridges and approaches thereto over the navigable waters of the United States except where the construction of a bridge would connect the United States or any territory or possession with a foreign country. The location and plans for such bridges must be approved by the Chief of Engineers and the Secretary of War before construction is commenced and, in approving the location and plans of any bridge, they may impose any specific conditions relating to the maintenance and operation of the structure deemed necessary in the interest of public navigation.

Section 502 (c) makes it unlawful to construct or commence the construction of any privately owned highway toll bridge until the location and plans thereof shall have been submitted to and approved by the highway department or departments of the State or States in which the bridge and its approaches are situated. The right is given to enter upon lands and acquire or condemn real estate and other property needed for the location, construction, operation, and maintenance of bridges and their approaches between two or more States.

Salaries

Members of Congress now receive an annual salary of $10,000. The Legislative Branch Appropriation Act of 1946 provided an additional expense allowance of $2,500 per year for members of the House. The Legislative Branch Appropriation Act of 1947 contained the same provision for Senators, effective after January 1, 1946. Effective on the

of a Federal agency or an employee of the Government, whether or not the discretion involved be abused. (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter. (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer. (d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U.S.C., title 46, secs. 741-752, inclusive), or the Act of March 3, 1925 (U.S.C., title 46, secs. 781-790), inclusive relating to claims or suits in admiralty against the United States. (e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended. (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States. (g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters. (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. (i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system. (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war. (k) Any claim arising in a foreign country. (l) Any claim arising from the activities of the Tennessee Valley Authority."

day on which the 80th Congress convenes, the salary of Members of Congress, by Section 601 of Title VI, is now increased to $12,500 per annum and the $2,500 annual expense allowance is made permanent. The annual compensation of the Speaker of the House of Representatives and the Vice President of the United States is increased from $15,000 to $20,000.

The provisions of the title also permit members of Congress to come under the Civil Service Retirement Act, provided they contribute six per cent of their annual salaries. No member is entitled to receive an annuity until he shall have become separated from the service after having had at least six years of service as a member of Congress and has attained the age of sixty-two years. The Government contributes to the retirement fund, and the annuity is an amount equal to 2½ per cent of the member's annual basic salary multiplied by his years of service, but not to exceed an amount equal to three-fourths of the compensation he is receiving at the time he becomes separated from the service.

Conclusion

The Legislative Reorganization Act of 1946 does not appreciably change the rules of debate in the Senate nor lessen the prerogatives of the Rules Committee in the House of Representatives, two things about which there was publicly expressed apprehension. Apart from the value of the reduction in the number of standing committees in the Senate and House of Representatives and the other changes made in the Rules of the two Houses, definite forward steps are taken by the Act in the provisions for professional staffs for committees, increased pay to clerical employees of committees, larger appropriations for the Office of the Legislative Counsel, and the expenditure analysis of federal agencies by the Comptroller-General.

In this connection a most important part of the Act is found in Section 203, Part 1, Title II, wherein the Legislative Reference Service is established as a separate department in the Library of Congress with its duties broadened, its appropriation and personnel greatly enlarged, and the appointment of all its specialists and other employees lodged in the hands of the Librarian of Congress. For many years Congress has been greatly handicapped due to the lack of an adequate staff of expert analysts to assist it in the formulation and study of legislative proposals—lack of proper working tools. It has had to rely too much and too long on the analysis and advice of the Executive Branch. Congress now makes a significant start toward freeing itself from this condition in forbidding the employment by Committees of persons detailed or assigned from any department or agency of the Government, without the written permission of the Committee on Rules and Administration of the Senate or the Committee on House Administration of the House of Representatives, and in making professional staff members of Committees ineligible for appointment to any office or position in the Executive Branch for a period of a year after they shall have ceased to be such a member.

Yet Congress has inconsistently placed the hiring of all the personnel of the Legislative Reference Service in the hands of an officer of the Executive Branch, the Librarian of Congress who is appointed by The President (by and with the advice and consent of the Senate) and is charged with administering the copyright laws in addition to his duties as head of the Library of Congress.[16] In that situation lies danger to the success of what Congress has sought to achieve because, unless the Librarian of Congress is superhumanly careful, it will be only a short time before the Executive Branch dominates the Legislative Reference Service.

Other titles and provisions display, if not a complete solution of the problems with which they deal, a diligent and sincere attempt on the part of Congress to improve the operating methods and potentialities of the Legislative Branch. In so doing it has taken significant steps affecting the administration of justice as well, as for example in the matter of tort claims. While there are many difficulties to be seen ahead in launching the legislative reorganization program, everyone interested in good government will hope for its success and that it will prove to be a start upon which much may be built in the coming years.

16. See 2 U.S.C. 136, and 17 U.S.C.A. 1-64.

"BOOKS FOR LAWYERS"

(Continued from page 761)

agreement on the content of our report.[1]

The great value of this report is that it gives international official sanction to the main scientific propositions that have already been published by public and private groups in various countries.

"Nuclear fission made possible a self-propagating release of enormous quantities of nuclear energy by means of a self-sustaining chain reaction. The first application was mass destruction on a staggering scale. But at the same time, the way was opened to a new era of industrial and scientific achievement." (page 1).

The good and evil possibilities are inextricably intermixed. "The activities leading to peaceful and destructive ends in this domain are so intimately interrelated as to be almost inseparable." (page 2).

Excellent phraseology helps us grasp the primary basic facts. "Atomic energy . . . comes only from a nuclear chain reaction which, like fire, is self-propagating. . . . Only one material found in nature in appreciable quantities has the property of 'nuclear inflammability', though two other fuels can be created by the 'burning' of the naturally occurring one." (page 4).

The *power* is there all right. "The consumption of about 2.2 pounds per day of uranium-235 generates heat at the rate of approximately a million kilowatts. The same

1. All the most powerful nations were represented on this Committee.

amount of heat could be obtained by burning about 3000 tons of coal per day, enough to supply the power and light for a city of about a million." (page 11).

The first process is bulky. "The mining and extraction of uranium ore and thorium ore is essentially a conventional operation comparable in scale with other mining operations." (page 5).

To fabricate the bomb itself is fairly cheap, but the intermediate step—the production of nuclear fuel—has to be done on a "huge scale". (page 8). The Hanford installation in the United States occupies a 600 square-mile site, cost $350,000,000, and required 45,000 construction workers at the peak. (Appendix 3).

The beneficial side of the picture is: "The availability of radioactive materials in adequate quantities should permit a renewed and very vigorous attack by tracer techniques on many research problems, notably in physiology, medicine, and the mechanism of chemical reactions. Some of the fission products may possibly replace radium in cancer treatment in the future . . . . Comparatively small reactors will usually be adequate". (page 13).

The underlying problem in technichal control is *diversion*. "Losses in processing are normal in metallurgical and chemical operations." (page 17). But how large is normal? Diversion, in other words theft, might easily appear to be a "normal loss".

At each succeeding stage, diversion becomes easier and more dangerous, and once nuclear fuels have been produced they "may be used directly for the manufacture of atomic weapons. *The installations necessary for weapon manufacture are relatively small and the time required is relatively short if the necessary high-skilled personnel is available and the procedure is known.*" (page 19). (Italics mine).

"Clandestine manufacture of atomic weapons from nuclear fuels diverted from stocks or from the plants producing such fuels would be extremely difficult to discover because the operations involved can be carried out in comparatively small installations which could easily be concealed." (page 22).

All the literature on the subject adds up to the proposition that control by *inspection* will *not* work.

What will work?

This Committee does not say. That was beyond the terms of its reference. It concludes: "Whether or not it (effective control) is politically feasible, is not discussed or implied in this report, nor is there any recommendation of the particular system or systems by which effective control can be achieved." (page 24).

This reviewer, who has to the best of his ability studied and reported on the unfolding literature on this subject, would sum up this Report in less inconclusive terms:

The fact is that one more great foundation stone has been swung firmly into place. The pattern for the whole foundation is becoming perfectly clear. It is law; international law of world-wide application, binding on all Nation-states and all inhabitants thereof. That law will vest in an international Authority legal ownership of the mines, legal ownership of the chemical and metallurgical plants processing uranium or plutonium, legal ownership of all nuclear fuels. Small quantities will be released to national or scientific bodies under revocable license. But sovereign legal title must be entrusted to an international agency or corporation authorized to exercise this Promethean power subject to such checks and controls as our best statesmanship can devise.

REGINALD HEBER SMITH
Boston, Massachusetts

"Previews" of Books

SELECTED LETTERS OF WILLIAM ALLEN WHITE: Henry Holt and Company announce for November 24 this collection of the honest thinking and the pungent writing of the Emporia editor who was of one of the most independent of Americans.

AN EDITOR'S NOVEL: Bobbs-Merrill are to issue on November 14 *'The Honorable John Hale'*, a political novel by Clifford Raymond, formerly chief editorial writer for the Chicago *Tribune*. Law and politics are intermingled in this tale of Chicago.

HIROSHIMA: John Hersey's much discussed article in the *New Yorker*, as to the effects of the atomic bomb (reviewed in 32 A.B.A.J. 665), will be published as a cloth-bound book on November 1 by Alfred A. Knopf ($1.00). Copies of the magazine had been selling at high premiums.

WHO'S WHO IN LABOR: Since labor organization has become "big business", the identity and biographies of the men who lead and represent unions in the United States and Canada was called for. The Dryden Press will issue it sometime in November ($12.00). The A.F. of L. and the C.I.O., and the Government, seemed to have joined in making it "official".

THE AMERICAN LEGION: Richard Seele Jones' comprehensive history of the Legion and its program is announced by Bobbs-Merrill for November 21. ($3.75).

"THE MYTH OF THE STATE": This is the title of the last book which Ernest Cassirer wrote, after he came to America from Oxford to teach at Yale and Columbia, following his exile from Germany in 1933. The Yale Press is publishing it this fall ($3.75). Cassirer was long re-

garded as one of the foremost contemporary philosophers. In this book he sought to show the dark forces which still beset the world—the real enemy of men's freedom, not the counterfeits.

A LAWYER'S REMINISCENCES: The publication of Julius Henry Cohen's chronicle of trial practice and his work with civic and political leaders, *They Builded Better Than They Knew* (32 A.B.A.J. 702) has been postponed to November, because of delays in printing.

THE SCIENCE OF ECONOMIC FORECAST: To develop the means of forecasting economic and business trends and rhythms as men predict the weather is the revolutionary project of *Cycles: The Science of Prediction,* by Edward R. Dewey and Edwin F. Dakin, which is announced for publication on November 24. This provocative book could be a landmark in economics or a "dud". Mr. Dewey is the Director of the Foundation for the Study of Cycles; his thesis is that the cycles, rhythms and patterns of the natural world have their counterparts in the business and economic world, and that business men, lawyers, economists and leaders of public opinion need to learn to appraise these and predict their effects on the business weather, else disaster will too often befall the United States. (Holt and Company; $2.75).

ELIZABETHAN DRAMATIC STORY: In 1938 the Cambridge University Press and the Huntington Library (California) published an edition of the original *Mirror for Magistrates,* an important source of Elizabethan story. There remained the two imitations of the *Mirror* which had adopted its name and extended its historical boundries: John Higgins' *The First Part of the Mirror for Magistrates* and Thomas Blenerhasset's *The Second Part of the Mirror for Magistrates.* Macmillan has now printed these from the original editions in the Huntington Library, under the title, *Parts Added to the Mirror for Magistrates,* with Lily B. Campbell, Professor of English at the University of California, as Editor. (Fall publication; price probably $12).

PRACTICALITIES OF POLITICS: What is meant to be a practical and sensible book on the political workings of society, from the routine, day-by-day work of the precinct or election district to the highest levels, is *How to Get Into Politics,* by Oliver Carlson and Aldrich Blake. It is said to be a really useful handbook. (Duell, Sloan and Pearce, Inc.; $2.50.)

Powerful Recruits for Individual Rights and Fair Play

Last November, Ben W. Palmer, of the Minneapolis Bar, contributed to the JOURNAL an article (31 A.B.A.J. 569) in which he sought to arouse American lawyers to serious thinking as to the extent to which the distressful conditions of today are the result of the continued repudiation of the moral content of law and life and of the abandonment of fair play and innate standards of justice as limitations to be observed and enforced by Courts and legislature in respect of majority use of the powers of government to serve the interests of groups which are politically powerful.

To dramatize his plea that the lawyers and people should bestir themselves to preserve the historic concepts of "the rudiments of fair play" between citizens and government, he entitled his article: "Hobbes, Holmes and Hitler". This striking juxtaposition was based on a contention that the beloved Holmes was typical of a school of juristic thought and action which conceives of "law" as the "preponderant opinion" of the popular majority and as answerable to no inherent standards of morality, justice, or constitutional restraints.

In our June issue (32 A.B.A.J. 328), Mr. Palmer re-stated his fundamental thesis as to the means of "Defense Against Leviathan". This immediately attracted Nation-wide attention, far outside the ranks of the Bar, and started many circles of thinking as well as response. In our September and October issues, he has replied to attacks on his pleas for the reassertion of "natural law" (32 A.B.A.J. 616 and 635).

Judge Robert N. Wilkin, of the United States District Court in Cleveland, Ohio, calls to our attention the fact that in June, following our publication of "Defense Against Leviathan", the *Life* magazine entered the discussion in its leading editorial with a plea for "natural law" and an analysis of the consequences of Holmes' juristic philosophy. In its issue of June 24, this great magazine, with a circulation of several millions, declared that "Holmes, who could act as though it existed, specifically repudiated natural law", and went on to say:

> This notion, that justice and the law are akin if not identical, was formerly fortified by a general belief in "natural law". But America produced a great skeptic and philosopher of the law who, while he added dignity and stature to the Supreme Court, also helped to erode the unquestioned faith in natural law on which its institutional dignity was based. This was Justice Holmes, a man so wise that he could fulfill what Frankfurter called "the first duty of an educated man . . . to doubt his major premise even while he continued to act on it".
>
> Holmes's influence was overpowering on many younger lawyers, especially those of the New Deal generation. There were avowed admirers, like Frankfurter, but Holmes's skepticism could also be read into the irreverent gaiety of Thurman Arnold and the other "laughing professors"

who delighted to disrobe many an institutionalized prejudice, the "Nine Old Men" among them. It may be doubted whether many of our present justices believe in natural law. Holmes, who could nevertheless act as though it existed, specifically repudiated natural law. Deeply as it would pain him to think so, that repudiation is the direct cause of the disrespect in which law—especially this Court's law—is held today.

The easiest philosophical alternative to believing in natural law is to believe in law as force. On this theory the Court becomes not a sanctuary but a center of power, power measured by its "control of the cops". Justices who think of the Court that way will naturally try to bend each decision to their personal will—even if they have to turn their sessions into dog-fights in the process.

That this was no casual utterance on the part of *Life* was demonstrated further by the fact that its July 1 issue published as an editorial the address by Mr. Justice Edward S. Dore, of the Appellate Division of the New York Supreme Court on "Human Rights and the Law", in which that experienced jurist pleaded for recognition that law is founded basically, not in man's subjective ideas or the will of majorities, but in concepts of natural law to which it should conform, and which vest him and his fellow-men with inalienable rights which all branches of government are bound to respect and protect unless "law" is to give way to totalitarian concepts of the supremacy of dictators or masses. Delivered before The Association of the Bar of the City of New York, Judge Dore's earnest address was published first in the *Fordham Law Review* (Vol. XV—No. 1; pages 3-18). It was reviewed and quoted from extensively in 32 A.B.A.J. 511.

These are great issues on which reasoning men may and do differ, as our columns have attested. The reassertion of the moral and religious content of law and life is fundamental, if rights are to be respected and fair play restored in the American scene. The coming of powerful recruits and contributors to the great debate is most heartily welcomed, because sooner or later the issue must be faced in America as to whether or not men, their homes, their work, their ways of life, and their liberties, are the subject-matter of inherent rights which all departments of government, including the Courts, are morally and legally bound to respect and protect.

SENATE ACTION FOR INTERNATIONAL JUSTICE

(Continued from page 779)

under Article 94, should the World Court in any case ever seek to exercise jurisdiction over a domestic issue, the Nation concerned would have recourse to the Security Council for final determination of any issue raised by its refusal to comply with any action taken by the World Court on a domestic issue.

In other words, it was pointed out by the proponents of the Connally Amendment that the language of the Amendment itself is in keeping with both Article 2, Section 7 and Article 94, Section 1 and 2, of the Charter.

Amendment Not Available as Subterfuge

However, it is the opinion of this writer that it does not follow that the language of the Connally Amendment would be applicable in any case in which it could be shown that the United States, by way of subterfuge, was in fact hiding behind the language of the Connally Amendment. Rather it is suggested that if in fact the issue involved in a legal dispute between the United States and some other Nation which had likewise accepted the obligatory jurisdiction of the World Court, was an issue of international law rather than a domestic issue, and the United States attempted to escape its obligation under its Declaration accepting the compulsory jurisdiction of the Court, the other Nation could bind the United States before the Security Council, and very much to its embarrassment.

Interpretation of the Amendment

It is the opinion of this writer that by accepting the principle of obligatory jurisdiction of the World Court, as contained in S. Res. 196, we would find ourselves before the Security Council and also before the deliberations of the General Assembly, if we should make use of the language of the Connally Amendment as a subterfuge or escape mechanism for living up to our clear obligations to submit to the obligatory jurisdiction of the World Court all legal disputes involving issues of international law as contrasted with domestic issues.

In fact, it is the view of this writer that the Connally Amendment puts the United States in a much more delicate position, and places upon it even more grave responsibility, insofar as submitting cases to the World Court is concerned, than would have been the case if the Amendment had not been adopted. Why does the writer entertain such a view? Because he thinks it is perfectly obvious that the eyes of every Nation in the world are going to be turned on the United States, whenever a legal dispute arises between this country and any other country.

Serious Questions as to American Good Faith

The first indication that the United States seeks to give a narrow rather than a very broad interpretation to the language of the Connally Amendment will most certainly raise serious questions as to our good faith. The Nations of the world are going to say to us, and rightly, that the United States Government is either in this game of cooperative international relations seeking to establish a permanent peace by way of international justice through law for keeps, or it isn't in it at all.

The first time we "pick up our

marbles and go home," so to speak, hiding behind an alleged right to quit the game of settling disputes between nations through the judicial processes of the World Court, on the pretext that a "domestic issue" is involved when in fact an issue of international law is involved, we will lose our standing as an advocate of international justice through law.

Hence this writer believes that the result of the Connally Amendment will be to place a much greater burden upon us, from the standpoint of maintaining our prestige among the other Nations in the world, than would have been the case had we left the question of determination of what is a domestic issue and what is a question of international law up to the World Court itself for determination. Such action on our part would have in no way jeopardized any of our interests because under Article 94, as pointed out above, we would have recourse to the Security Council if the World Court should ever make the mistake of violating its obligations, so clearly set out in the Charter, to limit itself to legal disputes involving issues of international law rather than domestic issues.

"A Tempest in a Teapot"

As a practical matter much of the controversy over the Connally Amendment is a tempest in a teapot, because under S. Res. 196, including the Connally Amendment, the State Department is the branch of government which will administer our country's participation in World Court cases.

Obviously common sense tells us that the State Department cannot expect to maintain friendly and cooperative relations with other Nations of the world if it ever seeks to violate the spirit and intent of S. Res. 196 by making use of the Connally Amendment as a subterfuge for escaping our clear obligation to submit all legal disputes involving international law issues to the obligatory jurisdiction of the World Court.

Argument Against the Amendment

During the debate on August 2 on the Connally Amendment, the writer spoke against the Connally Amendment as follows:

> I think it is only fair to say, in regard to the amendment, that its adoption will not have the effect which some members of the Senate seem to feel that it will have; namely, of crippling S. Res. 196. I believe that was brought out very clearly yesterday by the Senator from Vermont (Mr. Austin), who pointed out, as I tried also to do in the remarks which I made near the close of yesterday's session, that, after all, the machinery and procedure which was set up under The United Nations depends, so far as its final sanctions are concerned, upon the good faith of the signatories of the San Francisco Charter.
>
> As the Senator from Vermont explained yesterday, if the Resolution as submitted by the junior Senator from Oregon is adopted by the Senate, without including the amendment proposed by the Senator from Texas, and the World Court should, in a given case, render a decision which involved not a question of international law but a domestic issue, the United States would have the right, under Article 94 of the United Nations Charter to raise that point and refuse to abide by the decision of the World Court. The United States properly could take such a position until at least the Security Council passed judgment on the merits of its position as to whether or not the matter involved a domestic issue rather than one of international law. I think that viewpoint needs to be kept in mind as we weigh the pro's and con's of the discussion on the so-called Connally Amendment. I am opposed to the Amendment for the reasons which I shall presently set forth. I merely wish to say now, Mr. President, that should the Amendment be agreed to by the Senate of the United States this afternoon, I think it would be most unfortunate if the impression went abroad throughout this land and the remainder of the world that the effect of the Connally Amendment would be to destroy the effectiveness of S. Res. 196. . . .

Long-Run Objections Not Served by Amendment

> It must be kept in mind that the thing we are really aiming at is the long-range problem of bringing the entire world under the rule of law. It seems clear that if this rule is to be achieved, the participation of the United States is essential. We have no assurances as to what the consequences of this achievement might be but we entertain the hope, as the Under Secretary of State said during the committee hearing, that this may prove to be a long, and even a decisive step, toward crossing that line which separates world disorder from a world at peace. We are, therefore, attempting by this method to achieve a very high goal, and it is necessary to consider the aspects of the problem from this point of view. If the United States reserves to itself the power to decide an important jurisdictional question, we must act on the assumption that the other states in the world will do likewise.
>
> I emphasize that while the question of domestic jurisdiction is a domestic question in one sense, it is also a question of international law affecting the fundamental jurisdiction of the court. That is true because domestic jurisdiction and international jurisdiction are mutually exclusive concepts. If it is decided that a question is domestic, it therefore means that it is not a question covered by international law. Therefore, if we reserve the right to decide the question, it means that we, and we must assume every other state, are reserving the right to decide an international legal question. This is the situation which has existed in the past and which it is the very purpose of the Resolution to eliminate. As has been said many times during the progress of this Resolution, the rule of law cannot be established if the various states reserve to themselves the right to decide what the law is. It is from this very broad point of view that it can be said that the alternatives involve the question of future world peace. . . .

Legal Questions in Disputes Should Be Left to World Court

> I have no disposition to try to deprecate the importance and seriousness of entrusting legal questions to the International Court of Justice. The Court has been constructed with all the wisdom and care world statesmanship can devise. It is inconceivable to me that any judge of the Court could fail to see and be profoundly impressed with the inexpressedly high and important functions with which he is charged. It is inconceivable that any judge could even consider violating his solemn oath to decide these cases impartially on the basis of law and justice and in accordance with established principles of international law. . . .

I think it was intimated—yes, more than intimated—it was clearly stated, by the distinguished Senator from Vermont, that it is inconceivable that this country would even hide behind a subterfuge or alibi and claim an international law issue to be a domestic issue.

The United States will never take the position that an issue which clearly is not a domestic issue shall not be determined by the World Court, once we accept the obligatory jurisdiction of the World Court over purely international law issues. If we should take such an unconscionable position, it is perfectly clear that the good faith of this country would be clearly challenged by the other nations of the world. Other nations would protest any such conduct on our part just as we would if any other nation should, by way of subterfuge, take advantage of such a reservation once it had committed itself to submit purely international law issues to the obligatory jurisdiction of the Court. In this new "One World" no nation can afford to refuse to permit an international law issue to come before the Court for final determination on the ground or excuse that it is a democratic issue.

Primary Reasons for Opposing Amendment

As the Senator from Vermont pointed out, there is involved the question of good faith. The primary reason why I find myself opposed to the Amendment is that, from the standpoint of psychology, I think it is an unwise amendment. I think it would be better for us to let all issues go to the court for its determination as to jurisdiction, and then, if the Court should ever make a mistake, or commit an error, the fear of which I think, is inherent in the Connally Amendment, then we ought to proceed under Article 94, through the Security Council, for a determination as to whether the World Court in the given instance has gone beyond its jurisdiction in that it purports to determine an issue which is not an international law issue but is a domestic issue. Under the condition as to domestic issues already set out in S. Res. 196 beginning on page 2, line 12, what we agree to is to accept the obligatory jurisdiction of the World Court over international issues and not over domestic issues. Hence I consider the Connally Amendment both unnecessary and unwise.

Following the adoption of the Connally Amendment, Senator Millikin, of Colorado, proposed another amendment, which in fact would have vitiated S. Res. 196 had it been adopted. The Millikin Amendment proposed to restrict greatly the World Court in applying rules of law to disputes involving the United States. It proposed to add to the Resolution that the Declaration should not apply to "disputes where the law necessary for decision is not found in existing treaties and conventions to which the United States is a party and where there has not been prior agreement by the United States as to the applicable principles of international law."

Obviously this amendment was a clear reservation to The United Nations Charter itself. It amounted to an attempt to amend Article 38 of the Charter of the International Court of Justice, which reads as follows:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Thus it is seen from a reading of Article 38 of the Court Statute that the Millikin Amendment sought to eliminate Sections b, c, and d, from being applied in any case involving the United States. This amendment would in fact have scuttled the effectiveness of the World Court as a judicial tribunal in any case involving the United States.

Shortly, after a very remarkable debate, the Millikin Amendment went down to defeat by a vote of 11 ayes to 49 nays. In the course of that debate the writer made the following comments on the Millikin Amendment:

> I wish to summarize very quickly the difference in point of view between the Senator from Utah and myself. I think it is a very important difference. I think it is a difference in substance and is no mere matter of form. I think the amendment of the Senator from Colorado goes to the very heart of my Resolution and tears it out.
>
> I point out, in the first place, that what we did adopt this afternoon was an amendment submitted by the Sen-

ator from Texas which in no way affected or changed our rights under The United Nations Charter.

Under the Charter, as has been brought out over and over again in the debate, we were protected, under its terms and provisions, from any exercise of jurisdiction by the World Court over domestic issues. All that was accomplished by the Connally Amendment, which was adopted by the Senate, and against which I voted because I think it could be said that that amendment was unnecessary—all we did was make doubly sure that the Court would exercise no jurisdiction over domestic issues.

But I cannot agree with the Senator from Utah when he says that the amendment now proposed by the Senator from Colorado does not in fact have the effect of modifying our position under Article 38, because what the amendment makes very clear is that we shall not be subject to the jurisdiction of the World Court unless there is a prior agreement between us and the Nation with whom we are in dispute over the particular law which may be involved in the dispute. We are then reserving unto ourselves, I submit, the power to determine for ourselves whether or not we are going to be bound by the international law which the Court might find was binding upon us.

I say that we have already ratified the San Francisco Charter with Article 38 in it, and Article 38 contains provisions far beyond the provisions set forth in the amendment submitted by the Senator from Colorado. His amendment as I see it, is pretty much limited to Section (a) of Article 38:

"International conventions, whether general or particular, establishing rules expressly recognized by the contesting states."

He has been very careful to eliminate from the jurisdiction of the Court in any dispute which we might be involved in with another Nation coming before the Court, under S. Res. 196, Sections b, c, and d of article 38. . . .

I am going to make my last comment on this amendment, and I am going to make it with an earnest and sincere plea that it is to be hoped that the Senate of the United States this afternoon will not let the message go around this globe that we have reserved unto ourselves a restriction under Article 38 of the United Nations Charter insofar as our presenting cases to the World Court is concerned. I want to say that I think the point of view inherent in the attempt to get us to accept the restriction of the Millikin amendment is a dead point of view as far as public opinion in America is concerned. The American people by an overwhelming majority want us to support and accept the obligatory jurisdiction of the World Court. I am convinced of that. I pray that we will not place the dead hand of a dead point of view upon the future generations of America, and imperil here this afternoon the greatest opportunity I think this Congress will have to foster and advance the establishment of a world order by way of international justice through law.

After the defeat of the Millikin amendment and after the unanimous acceptance of the so-called Vandenberg Amendment, which provided that the declaration should not apply to

> c. Disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States especially agrees to jurisdiction.

a very dramatic thing happened in the Senate of the United States. A call went up from the lips of many Senators for a vote on S. Res. 196. There had been talk of many more amendments being submitted, some of which were known to be emasculating amendments.

However, apparently the overwhelming majority of the members of the Senate had become convinced that S. Res. 196 should be accepted as a vital part of the international policy of the United States. As the call "Vote, Vote, Vote," rang throughout the Senate Chamber, the presiding officer put the Resolution to the Senate for adoption and upon a roll-call vote it passed, 60 to 2. A predicted two weeks' bitter debate on the Resolution had dwindled into a debate of but a few hours, on the days of August 1 and August 2, 1946. It was an historic debate. How historic it was, only time will tell.

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